

**THE NEED TO REDEFINE THE CRITERIA OF WELL-FOUNDED FEAR FOR
UNACCOMPANIED MINORS SEEKING ASYLUM IN CANADA**

by
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A thesis submitted in fulfillment of the requirements
for the degree of Master of Laws, LL.M.

at

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Canada

**Le besoin de redéfinir le critère de la crainte de persécution pour les
mineurs non-accompagnés demandant l'asile au Canada**

Par

Josephine V S Chester

Mémoire soumis à la Faculté de droit en vue de l'obtention
du grade de Maître en droit, LL.M.

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Résumé du mémoire

Les mineurs non accompagnés sont des enfants âgés de moins de 18 ans dont ni les parents ni le tuteur légal ne sont présents au moment où ces enfants demandent l'asile au Canada. Comme les demandeurs d'asile adultes, les mineurs non-accompagnés demandant l'asile au Canada doivent prouver la crainte subjective et objective de persécution afin de se voir accordés le statut de réfugié en vertu de l'article 96 de la Loi sur l'immigration et la protection des réfugiés (« LIPR »). Toutefois, il se peut qu'un enfant demandeur du statut de réfugié ne puisse exprimer une crainte subjective de persécution de la même manière qu'un demandeur adulte. L'inférence de l'absence de crainte subjective qui peut être tirée de la conduite d'un mineur non-accompagné avant sa demande d'asile pourrait entraîner son refus. Les mineurs non-accompagnés incapables de démontrer la crainte subjective, quoiqu'il puisse exister des preuves objectives du risque de persécution, pourraient se voir être refusés le statut de réfugié. Ces mineurs non-accompagnés nécessitent une considération spéciale lorsqu'ils demandent l'asile, tant pour des questions procédurales que pour des questions de fond. Mon objectif est de démontrer que l'obligation de prouver la crainte subjective de persécution en vertu de l'article 96 de la LPIR doit être éliminée dans le cas des mineurs non-accompagnés. Cette démonstration sera effectuée en soulignant que le droit à l'égalité des mineurs non-accompagnés prévu à l'article 15 de la Charte Canadienne est violé lorsque l'on oblige ces derniers à prouver à la fois la crainte objective et subjective de persécution, et que cette violation n'est pas raisonnable et ne peut pas être justifiée dans le cadre d'une société libre et démocratique en vertu de l'article premier de la Charte. Qui plus est, la nécessité pour les mineurs non-accompagnés de prouver seulement la crainte objective de persécution sera justifiée en vertu du principe de l'intérêt supérieur de l'enfant et par la théorie du droit de Ronald Dworkin.

Abstract

Unaccompanied minors are children under the age of 18 who do not have their parents or legal guardian present at the time they make a refugee protection claim in Canada. Like adult refugee claimants, unaccompanied minors seeking asylum in Canada have to prove both subjective and objective fear for the well-founded fear to be accorded Convention refugee status under section 96 of the *Immigration and Refugee Protection Act (IRPA)*. However, a child refugee claimant may not be able to express subjective fear of persecution in the same manner as an adult refugee claimant. Inference of lack of subjective fear that can be drawn from the pre-application conduct of unaccompanied minors could lead to negative refugee determination. Unaccompanied minors, being not able to establish their subjective fear, though there may be objective evidence of a risk of persecution, may face denial of refugee protection. They require special consideration in their asylum claim, not only for procedural questions but also for substantive issues. My objective is to demonstrate that the requirement of subjective fear for the well-founded fear in section 96 of the *IRPA* has to be eliminated in the case of unaccompanied minors. This will be met by showing that unaccompanied minors' right to equality under section 15 of the Canadian Charter is violated by requiring them to prove both their subjective fear and objective fear, and that this violation is not reasonable and not demonstrably justified in a free and democratic society under section 1 of the Charter. Moreover, the need for unaccompanied minors to prove objective fear alone for their well-founded fear will be justified philosophically with the principle of the best interests of the child and the legal theory of Ronald Dworkin.

Abbreviations

Liberation Tigers of Tamil Eelam (LTTE)

The *Canadian Charter of Rights and Freedoms* (Canadian Charter)

The Citizenship and Immigration Canada (CIC)

The *Convention on the Rights of the Child* (CRC)

The Convention Refugee Determination Division (CRDD)

The *Convention relating to the Status of Refugees* (Refugee Convention)

The Immigration and Refugee Board of Canada (IRB)

The *Immigration and Refugee Protection Act* (IRPA)

The Immigration Appeal Tribunal (IAT)

The *Protocol Relating to the Status of Refugees* (Refugee Protocol)

The UNHCR *Handbook for Procedures and Criteria for Determining Refugee Status*
(UNHCR Handbook)

The United Nations High Commissioner for Refugees (UNHCR)

The United States' Immigration and Naturalization Guidelines (INS Guidelines)

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INTRODUCTION

"I declare justice is nothing but
the advantage of the stronger"

- Thrasymachus
Plato's *Republic* 338c

The United Nations High Commissioner for Refugees (UNHCR) has noted that "[a]mong refugee children, the most vulnerable are those who are not accompanied by an adult recognized by law as being responsible for their care."¹ In addition, the basic needs of unaccompanied refugee children are often not met and their rights are frequently violated. For this reason, the UNHCR recommends that in every asylum situation, the presence of unaccompanied children and the requirement of special actions for them must be anticipated.²

The UNHCR defines "unaccompanied minors" (also known as unaccompanied children) as children who are "under 18 years of age and who are separated from both parents and are not being cared for by an adult who by law or by custom³ is responsible to do so".⁴ The UNHCR regards "separated children" as "children who may be accompanied by extended family members, but have been separated from both parents

¹ United Nations High Commissioner for Refugees, *UNHCR Policy on Refugee Children*, 6 August 1993, EC/SCP/82; ExCom 44th session at 3, online: UNHCR Refworld© < <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f9e6a534>

² *Ibid.*

³ Custom is interpreted in the following context: For cultural, social or other reasons, a child may not have been raised by his or her natural parents. If a child is in a first asylum country with an adult other than the natural parent but who has nevertheless assumed the principal caretaking responsibilities towards the child, then this arrangement should be respected even if it has not been formalised. In this respect, it should be noted that the terms "adoption" and "fostering" are sometimes used informally by custom in certain cultures and should not be confused with the legal use of such terms in industrialized countries. However, care should be exercised to ensure that the situation presented by the caregiver actually reflects the true relationship and is not open to abuse: See United Nations High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Geneva: UNHCR, 1997) at 19-20 (Annex II, point 6)

⁴ United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees, questions relating to refugees, returnees and displaced persons and humanitarian questions: Assistance to unaccompanied refugee minors: Report of the Secretary-General*, UNGAOR, 60th Sess., Item 42 of the provisional agenda, UN Doc. A/60/300 (24 August 2005) at 3

or from their previous legal or customary primary caregiver”.⁵ These separated children face risks, according to the UNHCR, similar to unaccompanied minors.⁶ The UNHCR, many European experts, including non-governmental organisations involved in the Separated Children in Europe Programme⁷ encourage the use of the term “separated children”.⁸ They argue that the term ‘separated children’ recognises the underlying trauma of separation from parents or long-term primary caretakers that renders the children vulnerable. In addition, the term ‘separated children’ avoids inappropriate and narrow interpretations of the ‘unaccompanied’, which tend to exclude children who are escorted by any adult, including irresponsible acquaintances, smugglers or traffickers. Moreover, the use of the term ‘separated children’ would remind governments of their responsibility to assess the relationship of all adult escorts with the minors and to uncover the true circumstances of the minors.⁹ However, in practice, few states use the

⁵ *Ibid.*

⁶ *Ibid.*

⁷ The Separated Children in Europe Programme was established in 1997 as a response to the situation of increase in the numbers of separated children arriving in European countries. The programme seeks to improve the situation of separated children through research, policy analysis and advocacy at the national and regional levels. This programme is a joint initiative of the UNHCR and Save the Children. See online: Separated Children in Europe Programme <http://www.separated-children-europe-programme.org/separated_children/about_us/scep_programme.html>

⁸ Sarah Maloney, “TransAtlantic Workshop on ‘Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe’, held at Georgetown University, 18-19 June, 2001” (2002) 15 J. Refugee Stud. 102 at 103; See United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees, questions relating to refugees, returnees and displaced persons and humanitarian questions: Protection and assistance to unaccompanied and separated refugee children: Report of the Secretary-General*, UNGAOR, 56th Sess., Item 126 of the provisional agenda, UN Doc. A/56/333 (7 September 2001); See Sandy Ruxton, “Separated Children Seeking Asylum in Europe: A Programme for Action”, (2000), online: Separated Children in Europe Programme <http://www.separated-children-europe-programme.org/separated_children/publications/reports/index.html#eu_asylum> (“Until relatively recently, “unaccompanied children” or “unaccompanied minors” have been the main terms used to describe children who have fled from their countries of origin without their parents. But as many children undertake their journeys accompanied by other members of their families or family friends, in recent years the term “separated children” has begun to be accepted as more appropriate. This change of terminology widens the definition to include these children who might arrive with family members or other potential customary caregivers who were not previously their primary caregivers. The widening of the definition creates a clearer focus on the key issue of children’s separation from their parents or prior primary caregiver” at 32)

⁹ Maloney, *ibid.*

expanded international definition of the term “separated children” and most continue to use the term “unaccompanied minors” in their asylum laws and statistics.¹⁰

In Canada, the Citizenship and Immigration Canada (CIC), in its policy and program manual for immigration officers provides the definitions of a separated child, an unaccompanied child and a child in need of protection as follows:

Separated child- refers to a child under the age of 18 who is separated from both parents, or from their legal guardian, but not necessarily from other relatives. A separated child may therefore include a child accompanied by other adult family members.

Unaccompanied child – refers to a child under the age of 18 who does not have their parents or legal guardian present at the time they make a refugee protection claim in Canada.

Child in need of protection – in the context of child welfare, a child in need of protection is a child, as determined in the respective provincial jurisdiction, who may be at risk of abuse or has been abandoned, deserted or neglected, and includes children who are suspected to have been smuggled and trafficked.¹¹

According to the Immigration and Refugee Board of Canada (IRB), unaccompanied children are children who are alone in Canada without their parents or anyone who purports to be a family member.¹² For example, an older child may be living on his or her own or a child may be in the care of a friend of the child’s family. These children should be considered as unaccompanied children.¹³ When children arrive in Canada with persons who purport to be members of the child’s family and if the Convention Refugee Determination Division (CRDD) is satisfied that these persons are related to the child, then the child will be considered as an “accompanied child”.¹⁴

¹⁰ United Nations High Commissioner For Refugees (UNHCR), *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001-2003* (Geneva: UNHCR, 2004) at 2

¹¹ Citizenship and Immigration Canada, *PP1: Processing Claims for Refugee Protection in Canada* (4th April 2008), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/resources/manuals/pp/pp01e.pdf>>; Compare Mehrunnisa A. Ali, Svitlana Taraban & Jagjeet Kaur Gill, “Unaccompanied / Separated Children Seeking Refugee Status in Ontario: A Review of Documented Policies and Practices” *CERIS Working Paper No. 27* (August 2003) at 8, online: CERIS <http://ceris.metropolis.net/Virtual%20Library/Demographics/CWP27_Ali.pdf> (Originally Prepared for Citizenship and Immigration Canada, November 2002), where the CIC defines an unaccompanied child or separated child as one who is below eighteen years of age who arrives in or is already in Canada, is alone or is accompanied by a person who is not a member of the ‘family class’, or is not going to join her or his father, mother or guardian already in Canada.

¹² Immigration and Refugee Board of Canada (IRB), *Child Refugee Claimants: Procedural and Evidentiary Issues* (Ottawa: Immigration and Refugee Board, 1996)

¹³ *Ibid.*

¹⁴ *Ibid.*

However, the CRDD will consider the child as an “unaccompanied” child, if the CRDD is not satisfied as to the family relationship.¹⁵

The UNHCR Guidelines provide that a child will be, *prima facie*, unaccompanied if he or she is not with his or her parents in the first asylum country.¹⁶ In addition, where a child is accompanied by an adult caregiver, the quality and durability of the relationship between the child and the caregiver must be evaluated to decide whether the presumption of “unaccompanied status” should be set aside.¹⁷ If an interviewer is in doubt as to the veracity of the account presented or the nature of the relationship between an adult caregiver and the child, the child should be processed as an unaccompanied child.¹⁸ In Canada, separated refugee children are usually referred as ‘unaccompanied minors’.¹⁹ Hence the terms ‘separated child’ and ‘unaccompanied minor’ will be used interchangeably, notwithstanding the interpretation is restrictive.

Unaccompanied or separated children are particularly vulnerable to exploitation and abuse.²⁰ Girls are at particular risk of being trafficked, including for purposes of sexual exploitation. Unaccompanied or separated children face trafficking or re-trafficking, where a child was already a victim of trafficking, as one of the dangers.²¹ Trafficking in children is a threat to the fulfilment of children’s right to life, survival and

¹⁵ *Ibid.* Indeed, there are two ways to determine the veracity of the relationship between an acceptable adult caregiver and a minor: objective and subjective. A relationship can be proved by objective documents, such as birth certificates, family registry, or DNA testing. However, this can be challenging for refugees who often lack documentation and are unable or unwilling to contact the authorities in their country of origin to obtain such documents. An adult-child relationship can also be established by means of subjective evaluation of the child’s physical and psychological state: See Judith Wouk *et al.*, “Unaccompanied/Separated Minors and Refugee Protection in Canada: Filling Information Gaps” *Refugee* 23:2 (22 June 2006) 125

¹⁶ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at 19 (Annex II, point 2)

¹⁷ *Ibid.* at 19 (Annex II, point 5)

¹⁸ *Ibid.* at 19 (Annex II, point 4)

¹⁹ Geraldine Sadoway, “Canada’s Treatment of Separated Refugee Children” (2001) 3 *Eur. J. Migr. & L.* 347 at 352; Wendy Ayotte, *Separated Children Seeking Asylum in Canada* (Ottawa: United Nations High Commissioner for Refugees, 2001) at 2

²⁰ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 3 June 2005, CRC/GC/2005/6, online: UNHCR Refworld© <<http://www.unhcr.org/cgi-in/texis/vtx/refworld/rwmain?docid=42dd174b4>> at 11

²¹ *Ibid.* at 11

development. According to Article 6 of the *Convention on the Rights of the Child*²² (CRC), State parties have to recognise children's right to life and ensure the survival and development of the child. Moreover, according to Article 35 of the CRC,²³ State parties should take appropriate measures to prevent trafficking.

Children who become victims of trafficking result being separated from their parents.²⁴ Such children should receive assistance as victims of serious human rights violations. In fact, the UNHCR recommends the following:

Some trafficked children may be eligible for refugee status under the 1951[Refugee] Convention, and States should ensure that separated and unaccompanied trafficked children who wish to seek asylum or in relation to whom there is otherwise indication that international protection needs exist, have access to asylum procedures.²⁵

Indeed, children at risk of being re-trafficked should not be returned to their home country unless it is in their best interests.

The obligation from Article 22 of the CRC requires State parties to take “appropriate measures” to ensure that a child, whether unaccompanied or accompanied, who is seeking refugee status receives appropriate protection.²⁶ Here, “appropriate measures” includes responsibility to set up a functioning asylum system and in particular, to enact legislation addressing the particular treatment of unaccompanied and separated children and to build capacities necessary to realize this treatment pursuant to applicable rights in the CRC and in other international human rights instruments, including refugee protection and humanitarian instruments, to which the State is a party.²⁷

The Paris Principles reinforce that when assessing the refugee claims of children, the refugee definition in the Refugee Convention

must be interpreted in an age and gender-sensitive manner, taking into account particular motives for, and forms and manifestations of, persecution experienced by children. Unlawful recruitment or use of children is one of the child-specific forms and

²² *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 6 [CRC].

²³ *Ibid.*, art. 35

²⁴ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 11

²⁵ *Ibid.* at 11

²⁶ CRC, *supra* note 22, art. 22(1)

²⁷ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 13

manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds.²⁸

Therefore, States are urged to show utmost attention to such child-specific forms and manifestations of persecution in their national refugee status determination procedures.

With respect to child-specific forms and manifestations of persecution, the UN Committee on the Rights of the Child remind States about the need for age and gender-sensitive asylum procedures and an age and gender sensitive interpretation of the refugee definition.²⁹ The Committee points that under-age recruitment, which includes girls being recruited for sexual services or forced marriage with the military, and direct or indirect participation in hostilities constitute a serious human rights violation and thereby, persecution. According to the Committee, these should lead to granting of refugee status when the well-founded fear of such recruitment or participation in hostilities is based on grounds of “race, religion, nationality, membership of a particular social group or political opinion.”³⁰

The traditional criteria of well-founded fear of persecution, which requires subjective fear (i.e. subjective element) and objective fear (i.e. objective element), applies to all refugee claimants.³¹ Like adult refugee claimants, unaccompanied minors

²⁸ UN Children’s Fund (UNICEF), *The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, February 2007, online: UNHCR Refworld© <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=465198442>> at 15

²⁹ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 12

³⁰ *Ibid.* See *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, art. 1A(2) [Refugee Convention] (Definition of Refugee applies to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”); *Contra* Mirko Bagaric & Penny Dimopoulos, “Refugee Law- Time for a Fundamental Re-think: Need as the Criterion for Assistance” (2003) 9 *Canterbury L. Rev.* 268 at 290-291 (Bagaric & Dimopoulos propose that the five grounds in the Refugee Convention should be removed as they are arbitrary and discriminatory. They argue that pain and need should be the only relevant criteria for according refugee status.)

³¹ Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law Inc., 2007) at 112: Although leading scholars, like James C. Hathaway, have questioned the requirement of subjective fear, however, the jurisprudence has required both subjective fear and objective fear for all refugee claimants. See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at para. 47 [*Ward*]; *Parada v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 353 (T.D.) [*Parada*]; *Hatami v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 402 (T.D.) at para. 25 [*Hatami*]. For a critique of the

seeking asylum in Canada have to prove both subjective and objective elements for the ‘well-founded fear’ of persecution in order to be accorded Convention refugee status under section 96 of the *Immigration and Refugee Protection Act*³² (IRPA), which incorporates the definition of Convention refugee, as set out in the *Convention relating to the Status of Refugees*³³ (Refugee Convention), directly into Canadian immigration law.³⁴ Therefore, a refugee claim can fail if there is a lack of evidence going to the subjective element of the claim.³⁵ This appears to be so even when there is evidence that an objective basis for the fear exists.³⁶

The UN Committee on the Rights of the Child recommends that whenever there are indications that a “child may have a well-founded fear, even if unable to explicitly articulate a concrete [subjective] fear” but “may objectively be at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, otherwise be in need of international protection”, such a child should be referred to the asylum procedure.³⁷ This recommendation recognises the possible inability of children to express their subjective fear concretely or even understand they should be fearful. In fact, the Federal Court of Canada had noted in *Li v. Canada (Minister of Citizenship and Immigration)* that a child refugee claimant may not be able

requirement of subjective fear, see James C. Hathaway & William S. Hicks, “Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear?” (2005) 26 Mich. J. Int'l L 505

³² *Immigration and Refugee Protection Act*, R.S. C 2001, c. 27, s. 96

³³ Refugee Convention, *supra* note 30, art. 1A(2)

³⁴ Lorne Waldman, *Canadian Immigration & Refugee Law Practice* (Markham: LexisNexis, 2006) at 284

³⁵ *Kamana v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1695, IMM 5998-98 (T.D.) [*Kamana*]; *Tabet-Zatla v. Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1778, IMM-6291-98 (T.D.); *Fernando v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 759, [2001] F.C.J. No. 1129; *Anandasivam v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1106, [2001] F.C.J. No. 1519; *Kanyai v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 850, [2002] F.C.J. No. 1124.

³⁶ *Sinora v. Minister of Citizenship and Immigration*, [1993] F.C.J. No. 725, no. 93-A-334 (C.A.); *Maqdassy v. Minister of Citizenship and Immigration*, 2002 FCT 182, [2002] F.C.J. No. 238; Immigration and Refugee board (IRB), “Assessment of Credibility in Claims for Refugee Protection” (31 January 2004), online: Immigration and Refugee Board of Canada, Legal Services <http://www.irb-cisr.gc.ca/en/references/legal/rpd/assesscred/index_e.htm> at 17

³⁷ UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 14

to express subjective fear of persecution in the same manner as an adult refugee claimant.³⁸

When children are accompanied by one or both of their parents and seek refugee status, children need not prove their well-founded fear because when their parents prove their well-founded fear, the dependent children are automatically accorded refugee status, without having to prove their own well-founded fear.³⁹ This approach is in line with the right to respect for family life so that when the head of family fulfils the criteria for refugee status, the accompanying dependent children will be granted refugee status.⁴⁰ This is a common practice of States, though not required under any article of the refugee treaties but done to promote family unity.⁴¹ However, the principle of family unity only applies when a child is with one or both parents so that a dependent child is granted refugee status, when his or her parent is granted refugee status.⁴²

Problem arises in the determination of refugee status in States where a child has to establish independently that he or she is a refugee and has a well-founded fear of persecution,⁴³ which requires the state of mind (subjective fear) to be supported by objective criteria.⁴⁴ This happens in two occasions: First, when the child is unaccompanied by family members; second, some states may require children to prove independently that they have a well-founded fear of persecution, even if children are accompanied by family members.⁴⁵ For instance, when a child is with an uncle, cousin or other relative, a State might not consider the accompanying relatives as a “family”

³⁸ *Li v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1242 at para. 15 [*Li*]

³⁹ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 363

⁴⁰ *Ibid.* at 364

⁴¹ United Nations High Commissioner for Refugees (UNHCR), *Handbook for Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1979, reedited 1992) at paras. 181-188, online: <<http://www.hrea.org/learn/tutorials/refugees/Handbook/hbtoc.htm>>. [UNHCR, *Handbook*]

⁴² United Nations High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care* (Geneva: UNHCR, 1994) at 42 [UNHCR, *Refugee Children: Guidelines*]; Family unity is part of Canadian refugee law because in *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), the Federal Court of Appeal found the minor appellant, Karen Lee, to meet the Convention refugee definition based on the principle of family unity.

⁴³ Bueren, *supra* note 39 at 364

⁴⁴ UNHCR, *Handbook*, *supra* note 41 at para. 38

⁴⁵ Bueren, *supra* note 39 at 364

and therefore, may require each person, including the child to make an individual claim.⁴⁶ In such a case, a child, though accompanied by relatives, is considered to be an unaccompanied minor⁴⁷ and has to prove, independently, his well-founded fear of persecution, and thereby, the child may risk the denial of refugee status⁴⁸ although his relatives may succeed in proving their well-founded fear of persecution and be determined as refugees.⁴⁹

Importantly, unaccompanied minors⁵⁰ seeking refugee status, who had undergone a trauma while leaving their country of origin, may not always be able to “verbalising their feelings” to adequately exhibit the subjective element of their well-founded fear.⁵¹ Moreover, decision maker at refugee determination hearings can infer absence of subjective fear from the actions or conduct of a refugee claimant in number of situations such as in : 1) applicant's delay in claiming refugee status; 2) applicant's failure to claim asylum in an intermediate country; 3) applicant's delay in fleeing the country of origin; 4) applicant's engagement in preflight conduct which increased his or her risk of being persecuted; and 5) applicant's return travel to his country of origin, where this is treated as evidence that he does not fear being persecuted there.⁵² Such inference of lack of subjective fear that can be drawn from the pre-application conduct of unaccompanied minors, when they fail to give plausible explanation, could lead to negative refugee determination. Besides, a finding of lack of subjective fear of a person

⁴⁶ UNHCR, *Handbook*, *supra* note 41 at para. 185

⁴⁷ See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 (“If the interviewer is in doubt as to the veracity of the account presented or the nature of the relationship between [adult] caregiver and child, then the child should be processed as an unaccompanied child” at 19, Annex II, point 4)

⁴⁸ See Jacqueline Bhabha, “Demography and Rights: Women, Children, and Access to Asylum” (2004) 16 *Int'l J. Refugee L.* 227 at 238-239 (Findings indicate that separated children are disadvantaged in being accorded the security of refugee status).

⁴⁹ UNHCR, *Handbook*, *supra* note 41 at para. 185

⁵⁰ This thesis will be using the term “unaccompanied minors” or “unaccompanied children” to include separated children too because both of these two groups have to establish their well-founded fear independently in order to qualify for refugee status since they are not accompanied by their parents.

⁵¹ Bueren, *supra* note 39 at 364

⁵² Hathaway & Hicks, *supra* note 31 at 525-531

is often found as equivalent to lack of credibility of a person.⁵³ Thus, children's testimony with credibility issues and inconsistencies can be determined to lack subjective fear. Consequently, unaccompanied minors, being not able to express their perception of the threat of persecution, though there may be objective evidence of a risk of persecution, may face denial of refugee protection.

Unaccompanied minors seeking asylum in Canada require special consideration in their asylum claim, not only for procedural questions but also for substantive issues. It will be shown, in my thesis, that with regard to dealing refugee claims of unaccompanied minors or separated children, the substantive asylum law in Canada has to be modified to respect the best interests of the child principle advocated by the CRC.⁵⁴ As well, my thesis will demonstrate that adopting a single objective element and eliminating the subjective fear requirement from the criteria of well-founded fear for unaccompanied minors would take into account their age, vulnerability and their special needs as children.

Importantly, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose".⁵⁵ However, the word "well-founded fear" in section 96 of the *IRPA* will make more sense if it consists of the requirement of objective fear alone for unaccompanied minors seeking asylum in Canada, considering their inability to express their subjective fear due to age and vulnerability. Construing 'well-founded fear' to require objective fear exclusively in the case of unaccompanied minors seeking asylum would enable the word 'well-founded fear' in section 96 of the *IRPA* to have a specific role to play in advancing the legislative purpose of the *IRPA*, which is to offer safe haven to persons with a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment.⁵⁶ Although unaccompanied minors and adult refugee claimants are entitled to the same refugee protection, children's age and special

⁵³ Waldman, *Canadian Immigration & Refugee Law Practice*, *supra* note 34 at 285

⁵⁴ CRC, *supra* note 22, art. 3(1)

⁵⁵ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Vancouver: Butterworths Canada Ltd, 2002) at 158

⁵⁶ *Immigration and Refugee Protection Act*, *supra* note 32, s.3(2)(d)

vulnerabilities require an age-sensitive approach to be adopted to interpret refugee law.⁵⁷

Therefore, the objective of my thesis is to show that the requirement of subjective fear for the ‘well-founded fear’ in section 96 of the *IRPA* has to be eliminated in the case of unaccompanied minors. This means that unaccompanied minors need only to prove a single objective element for the ‘well-founded fear’ in section 96 of the *IRPA*. This objective will be met by showing that unaccompanied minors’ right to equality under section 15 of the *Canadian Charter of Rights and Freedoms*⁵⁸ (Canadian Charter) is violated by requiring them to prove both their subjective fear and objective fear, and that this violation is not reasonable and not demonstrably justified in a free and democratic society, under section 1 of the Canadian Charter.⁵⁹ In addition, the need for unaccompanied minors to prove a single objective element for their well-founded fear, without having to demonstrate their subjective fear, will be defended with the best interests of the child principle and the legal theory of Ronald Dworkin.

In part one, the traditional criteria of well-founded fear of persecution will be explained, showing the current requirement of subjective element and objective element for the ‘well-founded fear’ for all refugee claimants in Canada, including unaccompanied minors seeking asylum.

Part two will explain why the traditional criteria of well-founded fear should not be applied to unaccompanied minors. Given that refugee definition in the Refugee Convention “must be interpreted in an age and gender-sensitive manner, taking into account...forms and manifestations of, persecution experienced by children”,⁶⁰ part two will illustrate that ‘persecution’ has to be construed in a child-centred manner when determining the well-founded fear of unaccompanied children. In addition, part two will show that vulnerability of unaccompanied minors requires special consideration to

⁵⁷ Alice Edwards, “Age and gender dimensions in international refugee law” in Erika Feller, Volker Türk & France Nicholson, eds., *Refugee Protection in International Law* (Geneva: Cambridge University Press & UNHCR, 2003) at 57

⁵⁸ *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*]

⁵⁹ *Ibid.*, s. 1

⁶⁰ UNICEF, *supra* note 28 at 15

exempt them from demonstrating their subjective fear. Subsequently, it will be shown that the two elements requirement for well-founded fear in the case of unaccompanied minors is not child-centred because children's dependency on others, their age and their maturity are linked to their inability or unwillingness to express their subjective fears.⁶¹ Moreover, unaccompanied minors' varied backgrounds, cultures and their distinctive forms of expressing their emotional reactions could also contribute to their difficulty to express their subjective fear.⁶²

Subsequently, part two will also illustrate why inferences of lack of subjective fear should not be drawn from the pre-application conduct of unaccompanied minors. This part will show some of the advantages of using a single objective element for well-founded fear in the case of unaccompanied minors. One advantage is that eliminating subjective fear requirement for unaccompanied minors would mean that decision-makers need not rely on mechanisms to infer lack of subjective fear or to create innovative ways to circumvent the subjective apprehension element. Briefly, in this part, a broader single objective test will be conceptualized for unaccompanied minors.

In part three, it will be shown that the two elements requirement for the 'well-founded fear' in section 96 of the *IRPA*,⁶³ in the case of unaccompanied minors seeking asylum in Canada, violates their right to equality under section 15 of the Canadian Charter.⁶⁴ It will be shown whether the limit of imposing 'subjective fear and objective fear' on unaccompanied minors to establish their 'well-founded fear' in section 96 of the *IRPA* is 'prescribed by law' within the meaning of section 1 of the Charter.⁶⁵ The need to apply section 1 of the Canadian Charter to justify violation of section 15 of the Charter will also be discussed. Ultimately, it will be shown that violation of section 15,

⁶¹ UN High Commissioner for Refugees, *Children At Risk*, Standing Committee, 38th meeting, EC/58/SC/CRP.7, 22 February 2007, online: UNHCR Refworld© <<http://www.unhcr.org/excom/EXCOM/45ddb7722.pdf>> at 2 [UNHCR, *Children At Risk*]

⁶² See Elizabeth Adjin-Tettey, "Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law" (1997) 25 Man. L.J. 127 at 131 [Adjin-Tettey, "Reconsidering"]

⁶³ See *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 CF 409, [2005] F.C.J. No. 506, IMM-4638-04 ("There are subjective and objective components to section 96 [of the *IRPA*]" at para. 27) [Jarada].

⁶⁴ *Charter*, *supra* note 58, s. 15

⁶⁵ *Ibid.*, s. 1

with respect to unaccompanied minors seeking asylum in Canada, is not saved by section 1 of the Canadian Charter,⁶⁶ by applying the Oakes Test.⁶⁷ In this way, it will be demonstrated that section 96 of the *IRPA* is unconstitutional. Moreover, remedies to systemic inequality will be briefly discussed, showing that reading in would be the most appropriate remedy and highlighting the need for the Canadian Parliament to bring the interpretation of ‘well-founded fear’ in section 96 of the *IRPA* in compliance with the formal requisites of section 15 of the Canadian Charter.⁶⁸ With respect to the interpretation of ‘well-founded fear’ in section 96 of the *IRPA*, it will be shown that Parliament could adopt an exception clause to require objective fear only from unaccompanied minors seeking asylum in Canada.⁶⁹

In part four, the need to use a single objective element for well-founded fear in the case of unaccompanied minors will be philosophically justified using the legal theory of Ronald Dworkin. His legal theory on principle, policy and rule will be explored to philosophically defend the use of the best interests of the child principle to interpret the criteria of well-founded fear for asylum seeking unaccompanied minors. As well, through a brief discussion on Dworkin’s theory, distinguishing between matters of substance and matters of process, it will be shown why judges have to make substantive political decisions to redefine the criteria of well-founded fear, to be consisting of a single objective element, in section 96 of the *IRPA* for unaccompanied minors seeking refugee status in Canada. In addition, Dworkin’s legal theory on constructive interpretation will be analyzed. In Dworkin’s view, for nearly all legal questions, there is a unique right answer, a best interpretation.⁷⁰ Adopting a single objective element for the criteria of well-founded fear, in the case of unaccompanied minors seeking asylum

⁶⁶ *Ibid.*

⁶⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71 [*Oakes*]; *Charkaoui v. Canada* [2007] S.C.J. No. 9 at para. 67 [*Charkaoui*]

⁶⁸ *Charter*, *supra* note 58, s. 15

⁶⁹ See e.g. *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 124-125 [*Sharpe*] (When considering the appropriateness of reading in the exception clauses, Chief Justice McLachlin suggested that exception clauses are the sort of provision that Parliament would have adopted had it known the limitations of the Charter.)

⁷⁰ Robert Lane, *Philosophy of Law Lecture Notes* (College of Arts and Sciences, University of West Georgia, 20 October 2005)

in Canada, would result in a best interpretation, considering their plight and vulnerability. Furthermore, Dworkin's two conceptions of the rule of law: "rule-book" conception and "rights" conception⁷¹ will be discussed. Finally, Dworkin's legal theory on the right to equality and reverse discrimination will also be analyzed to philosophically justify the use of a single objective element for well-founded fear in the case of unaccompanied minors seeking asylum in Canada.

1 Traditional Criteria of Well-Founded Fear for Convention Refugees requires Subjective and Objective Elements

In this part, the traditional criteria of well-founded fear of persecution in the definition of a Convention refugee will be explained, showing the current requirement of subjective element and objective element for the 'well-founded fear' for all refugee claimants in Canada, including unaccompanied minors seeking asylum. In addition, this part will explain the threshold standard required for the well-founded fear, for example, whether the courts require a probability of persecution, a reasonable chance of persecution or substantial grounds of risk of persecution.

1.1 Subjective Element and Objective Element

The UNHCR *Handbook for Procedures and Criteria for Determining Refugee Status*,⁷² (UNHCR Handbook) which is a non-binding document, has interpreted the term 'well-founded fear of persecution' in the definition of a Convention refugee to be containing "a subjective and an objective element" and has stated that both elements have to be considered. Likewise, citing *Rajudeen v. Canada (Minister of Employment*

⁷¹ Ronald Dworkin, *A Matter of Principle* (London : Harvard University Press, 1985) at 11

⁷² UNHCR, *Handbook*, *supra* note 41 at para. 38. The Refugee Convention and the 1967 Protocol provide for co-operation between the Contracting States and the Office of the United Nations High Commissioner for Refugees. The UNHCR *Handbook* is a non-binding document to guide the determination of refugee status, under the Refugee Convention and the 1967 Protocol. See *A.L.J. (Re)*, [2002] C.R.D.D. No. 31, Immigration and Refugee Board Decision, No. VA1-00781, February 22, 2002 at para. 17 (The UNHCR *Handbook*, although not binding, has been considered by the Supreme Court of Canada to be a persuasive authority).

and Immigration),⁷³ the Federal Court of Canada reaffirmed that the term “well-founded fear” as found in the definition of a Convention refugee has two elements, the subjective fear of persecution felt by the applicant and the objective element.⁷⁴ The Federal Court of Appeal in *Rajudeen v. Canada (Minister of Employment and Immigration)* had explained that “[t]he subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee’s fear be evaluated objectively to determine if there is a valid basis for that fear”.⁷⁵

Indeed, to establish a fear of persecution, in *Canada (Attorney General) v. Ward*,⁷⁶ the Supreme Court of Canada has reaffirmed the bipartite traditional approach, which was articulated and applied by Heald J.A in *Rajudeen*.⁷⁷ The Supreme Court of Canada has held that “the test is bipartite: 1) the claimant must subjectively fear persecution; and 2) this fear must be well-founded in an objective sense”.⁷⁸

Therefore, presently, the traditional criteria of well-founded fear of persecution requires a subjective element and an objective element (i.e. subjective fear and objective fear). This traditional criteria applies to all refugee claimants.

1.2 Threshold Standard for Well-founded Fear

In *Adjei v. Canada (Minister of Employment & Immigration)*,⁷⁹ the Federal Court of Appeal stated that the standard of well-founded fear is not so stringent as to require a probability of persecution. A refugee claimant does not have to prove that persecution is more likely than not to occur.⁸⁰

⁷³ *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 at 134, [1984] F.C.J. No. 601 (C.A.) [*Rajudeen*]

⁷⁴ *Begollari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1340, [2004] F.C.J. No. 1613 at para. 18 [*Begollari*]

⁷⁵ *Rajudeen*, *supra* note 73

⁷⁶ *Ward*, *supra* note 31 at para. 47

⁷⁷ *Rajudeen*, *supra* note 73 at 134

⁷⁸ *Ward*, *supra* note 31 at para. 47

⁷⁹ *Adjei v. Canada (Minister of Employment & Immigration)*, [1989] 2 F.C. 680 (C.A.) [*Adjei*]

⁸⁰ *Ibid.*

In *I.F. v. Canada (Minister of Citizenship and Immigration)*,⁸¹ Justice Lemieux of the Federal Court of Canada explained that the appropriate standard of proof in respect to section 96 of the *IRPA* is where a risk of persecution is gauged by proof that there is a reasonable chance or more than a mere possibility that a refugee claimant would face persecution if returned to his home country.

Likewise, in *Mumuni v. Canada (Minister of Citizenship and Immigration)*,⁸² the Federal Court of Canada stated that to be accorded refugee status under section 96 of the *IRPA*, a refugee claimant must satisfy the IRB that there is a reasonable chance, or more than a mere possibility, that he or she risks facing persecution if returned to his country of origin. According to the Court, reasonable chance or more than a mere possibility of persecution will be the correct standard of proof to assess a refugee claim under section 96 of the *IRPA* in Canada.⁸³ However, a refugee claimant need not show substantial grounds of risk of persecution, namely, that “the claimant would face a substantial possibility of serious harm” or that “the claimant would face any significant risks”.⁸⁴

The Federal Court of Appeal in *Adjei v. Canada (Minister of Employment & Immigration)*⁸⁵ has held that anything more than a mere possibility of persecution is a well-founded fear. Moreover, anything more than a mere possibility is a serious possibility.⁸⁶ The IRB will determine that a refugee claimant is not a Convention refugee if it finds no serious possibility or reasonable chance that the claimant would be persecuted for any reason set out in the definition of Convention refugee should he or she return to her home country.⁸⁷

⁸¹ *I.F. v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1472 at paras. 15-24

⁸² *Mumuni v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1407 at paras. 24-25

⁸³ *Ibid.*

⁸⁴ *Ibid.* at para. 24-28

⁸⁵ *Adjei*, *supra* note 79

⁸⁶ Lorne Waldman, *The Definition of Convention Refugee* (Markham: Butterworths Canada Ltd, 2001) at para 8.60.1

⁸⁷ *Ayala v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 690 at para. 28 [*Ayala*], the Federal Court finds that the Immigration and Refugee Board properly assessed the objective basis of the Applicants’ claim, citing *Pehtereve v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No 1491 (T.D.) at para. 13 that “Nor am I persuaded that the tribunal misunderstood or misstated the evidence of the applicant in any way significant for its ultimate finding that the applicant is not a

In *Ponniah v. Canada (Minister of Employment and Immigration)*,⁸⁸ the Federal Court of Appeal explained that “good grounds” or “reasonable chance” indicates that there need not be more than a fifty percent chance (a probability), but there must be more than a minimal possibility. This could also be referred as a “reasonable” or even a “serious possibility” but not a mere possibility.⁸⁹ Moreover, “good grounds” or “reasonable chance” occupies a field between upper and lower limits and it is less than a fifty percent chance (a probability) but more than a mere or minimal possibility.⁹⁰ Therefore, a refugee claimant facing slightly more than a mere possibility of persecution would have crossed the lower limit and would have proven his case on good grounds or on a reasonable chance for fearing persecution.⁹¹

Briefly, Hathaway highlighted that a mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear.⁹² A refugee has to demonstrate only a “real chance” or “reasonable possibility” of being persecuted.⁹³ Reasonable possibility standard means that a refugee claimant need not be an actual victim of persecution so as to have a well-founded fear.⁹⁴

Importantly, past persecution substantiates a prospective fear of persecution.⁹⁵ Although past persecution *per se* is not a basis to accord Convention refugee status, it may be still an indicative to what is likely to happen to a claimant if he were to return to his country of origin. In *Ward*,⁹⁶ the Supreme Court of Canada emphasized that evidence of past persecution, or evidence of other similarly situated individuals, could be used to establish the objective basis for a fear of persecution.

Convention refugee, because it found no serious possibility or reasonable chance she would be persecuted for any reason set out in the definition of Convention refugee should she return to Estonia”.

⁸⁸ *Ponniah v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 359, 132 N.R. 32 at 34 (C.A.) [*Ponniah*]

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Hathaway & Hicks, *supra* note 31 at 508

⁹³ *Ibid.*

⁹⁴ Elizabeth Ammah Adjin-Tettey, *A Feminist Analysis of the Convention Refugee Definition* (D. Jur. Thesis, York University, 1996) at 186

⁹⁵ *Ibid.*

⁹⁶ *Ward*, *supra* note 31 at 724

The legal burden of proof is on the refugee claimant to demonstrate that he or she falls within the definition of Convention Refugee⁹⁷ in section 96 of the *IRPA*.⁹⁸ In *Canada (Minister of Citizenship and Immigration) v. Shwaba*,⁹⁹ the Federal Court of Canada illustrated this, citing *Chan v. Canada (Minister of Employment and Immigration)*¹⁰⁰ in which the Supreme Court had emphasized that a refugee claimant has the burden of proof to establish a well-founded fear of persecution. The Supreme Court has stated that this determination requires a careful analysis of the claimant's testimony and of documentary evidence about the conditions in the country of origin.¹⁰¹

In essence, in order to establish that a fear of persecution is well-founded, a refugee claimant has to present evidence that there is an objective basis to his or her claim.¹⁰² The most important evidence will be the past experiences of the claimant.¹⁰³ If the claimant has been the subject of persecution in the past, this would justify an inference that the claimant would suffer persecution in the future unless there has been a change in circumstances that would suggest to the contrary. Similarly, the claimant will have to present evidence as to the current conditions in the claimant's country. This evidence can be in the form of personal testimony of the claimant, documentary evidence from reputable sources, testimony from experts who have knowledge of claimant's country conditions, or evidence of other person's similar situation to the claimant.¹⁰⁴

2 Traditional Criteria of Well-founded Fear should not be applied to Unaccompanied Minors

⁹⁷ Jones & Baglay, *supra* note 31 at 97

⁹⁸ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

⁹⁹ *Canada (Minister of Citizenship and Immigration) v. Shwaba*, 2007 FC 80, [2007] F.C.J. No. 119 at para. 14

¹⁰⁰ *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 [*Chan*]

¹⁰¹ *Ibid.*

¹⁰² Waldman, *The Definition of Convention Refugee*, *supra* note at para. 8.61

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

This part will demonstrate why the traditional criteria of well-founded fear, which requires subjective and objective fear, should not be applied to unaccompanied minors. It will be shown that there is lack of reference to unaccompanied minors in the refugee definition. Subsequently, it will be shown that ‘persecution’ has to be construed in a child-centered manner for unaccompanied minors. Besides, it will be highlighted that vulnerability of unaccompanied minors requires special consideration to exempt them from demonstrating their subjective fear. Consequently, it will be demonstrated that subjective and objective elements requirement for the well-founded fear is not child-centered in the case of unaccompanied minors. Moreover, it will be explained why inferences of absence of subjective fear should not be drawn from unaccompanied minors’ pre-application conduct. Subsequently, some of the advantages of using a single objective element to determine the well-founded fear of unaccompanied minors will be explained. As a result, this part will conclude by conceptualizing a broader single objective test for unaccompanied minors seeking asylum in Canada.

2.1 Lack of Reference to Unaccompanied Minors in the Refugee Definition

There is lack of reference to unaccompanied minors in the Convention refugee definition. For instance, the definition of refugee in the Refugee Convention¹⁰⁵ and in the *Protocol Relating to the Status of Refugees*¹⁰⁶ (Refugee Protocol) is not age specific because it does not contain any specific reference to child refugee.¹⁰⁷ There is no special provision for the status of refugee children neither in the Refugee Convention nor in the Refugee Protocol.¹⁰⁸ Furthermore, the Refugee Convention and the Refugee Protocol set standards that apply to children in the same way as to adults.¹⁰⁹

¹⁰⁵ Refugee Convention, *supra* note 30

¹⁰⁶ *Protocol Relating to the Status of Refugees*, 4 October 1967, 606 U.N.T.S. 267

¹⁰⁷ Bueren, *supra* note 39 at 360

¹⁰⁸ UNHCR, *Refugee Children: Guidelines*, *supra* note 42 at 42

¹⁰⁹ *Ibid.* at 4

For example, the Refugee Convention,¹¹⁰ as supplemented by the Refugee Protocol,¹¹¹ previews the definition of “refugee” as a person who is outside his country of origin and who is unable or unwilling to return to his country of origin owing to a well-founded fear of persecution for reasons of his race, nationality, religion, membership in a particular social group, or political opinion.¹¹² Thus, in order to qualify for refugee status, children like adults must be outside their country of nationality or outside their country of habitual residence if they are stateless.¹¹³ In addition, children must show that they are unable or unwilling to return to their country of origin or to seek the protection of that country because of their well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹¹⁴ Therefore, the same standards apply to children and adults from the refugee definition.

In Canada, section 96 of the *IRPA*¹¹⁵ incorporates the definition of Convention refugee, as set out in the Refugee Convention, directly into Canadian immigration law.¹¹⁶ There is lack of reference to unaccompanied minors in the definition of Convention refugee in the Refugee Convention as well as in the Refugee Protocol and consequently, in section 96 of the *IRPA*. Thus, unaccompanied minors, like adults, have to prove their well-founded fear of persecution to qualify for refugee status, pursuant to the refugee definition.

Establishing the well-founded fear of persecution is the most difficult part of the refugee definition in a refugee determination process. This is because the claimant must establish that the harm feared is sufficiently serious to warrant international protection.¹¹⁷ There will be no doubts when acts such as physical abuse, torture or lengthy detention are the basis for a claim of persecution because these acts demonstrate

¹¹⁰ Refugee Convention, *supra* note 30

¹¹¹ *Protocol Relating to the Status of Refugees*, *supra* note 106, art. 1(2)

¹¹² Refugee Convention, *supra* note 30, art. 1A(2)

¹¹³ Bueren, *supra* note 39 at 361

¹¹⁴ *Ibid.*

¹¹⁵ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

¹¹⁶ Waldman, *Canadian Immigration & Refugee Law Practice*, *supra* note 34 at 284

¹¹⁷ Waldman, *The Definition of Convention Refugee*, *supra* note 86 at para 8.103

risk of serious harm. However, “the difficulty arises in considering other types of reprisals [or acts] which, although less serious, might still have serious impact on the life or well-being of the [refugee] claimant.”¹¹⁸ It is difficult to distinguish between persecution and other acts of harassment that are not sufficiently serious to warrant international protection.

Wendy Ayotte and Louise Williamson highlighted that the key aspects of the asylum process concern the interpretation of the definition of a refugee under the Refugee Convention and how the notion of persecution is construed.¹¹⁹ They noted that little guidance is available to asylum decision makers on how to include children within the refugee definition. Moreover, in all cultures, children’s experiences differ from those of adults, and for this reason, it is not appropriate that their refugee claims should be required to fit the paradigm of the ‘typical’ adult male refugee claimant. For instance, children have a well-founded fear of persecution because of the political activities of their parents or other family members. Although children may know little or nothing of the views or activities of the family member, they are at risk.¹²⁰

*Diagana v. Canada (Minister of Citizenship and Immigration)*¹²¹ illustrates why it is difficult for unaccompanied minors to prove their well-founded fear of persecution independently. In this case, an unaccompanied minor, Diagana, alleges a well-founded fear of persecution if required to return to Mauritania by reason of his race and his imputed political opinion. His father was active in politics in Mauritania. His family home was burned and his two older brothers were hanged. His family relocated to avoid trouble but still Diagana was arrested many times before he became politically active himself when he was fifteen years old. The IRB rejected Diagana’s refugee claim. The IRB found Diagana’s knowledge of his political party vague and “his vague testimony to undermine his credibility”.¹²² The IRB questioned his failure to leave Mauritania earlier, notwithstanding that he was very young when he finally took the initiative. The

¹¹⁸ *Ibid.*

¹¹⁹ Wendy Ayotte & Louise Williamson, *Separated Children in the UK: An overview of the current situation* (London: Save the Children & British Refugee Council, 2001) at 52

¹²⁰ *Ibid.*

¹²¹ *Diagana v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 330

¹²² *Ibid.* at para. 8

IRB found that Diagna showed “... a lack of diligence...” in the pursuit of his refugee claim.¹²³ Moreover, the IRB rejected his explanation for his failure to provide sworn corroborative evidence to support his allegations.

Therefore, the lack of reference to unaccompanied minors in the refugee definition of the Refugee Convention, and consequently, in section 96 of the *IRPA* contributes to a risk of denial of refugee status to unaccompanied minors seeking asylum in Canada because they have to prove, independently, the most difficult part of the refugee definition, namely, their well-founded fear of persecution. Thus, unlike adult refugee claimants, unaccompanied minors should not be subjected to the same traditional criteria of well-founded fear, which requires both subjective fear and objective fear.

2.2 Failure to Construe ‘Persecution’ in a child-centered way

In the definition of refugee of Article 1A(2) of the Refugee Convention, there is a failure to construe ‘persecution’ in a child-centred way as it is the same for adults and children.

As a party to the Refugee Convention, Canada is bound in international law not to reject a person who can demonstrate his or her well-founded fear of persecution. However, the UNHCR has noted that “there is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success”.¹²⁴

Although what constitutes ‘persecution’ is not well-defined in international law, case law and the UNHCR Handbook¹²⁵ provide some guidance. While trivial acts are not persecutory, actions violating a person’s fundamental human rights are persecutory.¹²⁶ Moreover, actual physical harassment¹²⁷ or deprivation of liberty¹²⁸ is

¹²³ *Ibid.*

¹²⁴ UNHCR, *Handbook*, *supra* note 41 at paras. 51-53

¹²⁵ *Ibid.* (Persecution is not defined in the Refugee Convention but guidance is provided in the UNHCR *Handbook*).

¹²⁶ Waldman, *Canadian Immigration & Refugee Law Practice*, *supra* note 34 at 290

¹²⁷ See *Amayo v. Canada (Minister of Employment & Immigration)*, [1982] 1 F.C. 520 (C.A.)

not considered as essential ingredient of persecution. Although persecution is not defined under the Refugee Convention, there is a prevailing view that refugee law should concern itself with the denial of core human rights as set out in the body of international law.¹²⁹

Thus, persecution can be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection¹³⁰ such that the “acts must be committed by the government (or the party) or organs at its disposal, or the behaviour must be tolerated by the government in such a way as to leave the victims virtually unprotected by the agencies of the State”.¹³¹ In addition, persecution includes the failure (voluntary or involuntary) on the part of the state authorities to prevent or suppress (private) violence.¹³²

In *Rajudeen v. Canada (Minister of Employment & Immigration)*,¹³³ the Federal Court of Canada used a very broad definition of persecution, suggesting that any systematic form of harassment¹³⁴ directed against a refugee claimant for reasons of race, religion, nationality, membership of a particular social group or political opinion would constitute persecution. Moreover, a person need not show that he or she has been subjected to persistent harassment over a long period of time. In fact, even one serious incident, it and itself, could constitute persecution.

¹²⁸ See *Oyarzo v. Canada (Minister of Employment & Immigration)*, [1982] 2 F.C. 779 at 782-783(C.A.)

¹²⁹ See James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 108; See UNHCR, *Handbook*, *supra* note 41 at para. 51

¹³⁰ See *ibid.* at 104-105

¹³¹ Chooi Fong, “Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats” (1981) 52 British Y.B. Intl. L. 53 at 92

¹³² Guy Goodwin-Gill, “Entry and Exclusion of Refugees: The Obligation of States and the Protection Function of the Office of the UNHCR” (1980) Michigan Y.B. Intl. L. Studies 291 at 298-299

¹³³ *Rajudeen*, *supra* note 73 at 133-134

¹³⁴ *Ibid.*, in which the Federal Court of Appeal considered the ordinary dictionary definition of ‘persecution’. Accordingly, “persecute” is defined as: “To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship”. In addition, persecution can be defined as “[a] particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.”

It should be noted that the tribunal has to consider the cumulative effect of a series of acts if one act might not in and of itself be considered persecutory.¹³⁵ Moreover, the IRB can assess evidence and draw inferences from that evidence to conclude whether harassment constitutes persecution.¹³⁶

To establish the criteria of “well-founded fear” of persecution, an unaccompanied minor, like an adult refugee claimant, must show that his or her fear is subjectively genuine and objectively reasonable.¹³⁷ However, it can be argued that these two elements are different for children and adults because certain thing may amount to persecution when applied to children whereas when the same thing is applied to adults, it may only be considered as discrimination or harassment.¹³⁸ The harm, which an unaccompanied minor fears or has suffered, may be less than that of an adult and still could qualify as persecution.¹³⁹ For instance, acts when directed at adults might be considered as harassment or interference, may, nevertheless, amount to persecution when applied to children for two reasons: Firstly, persecution arises because of children’s heightened sensitivity; secondly, persecution arises due to children’s heightened dependence.¹⁴⁰

To illustrate the first reason,¹⁴¹ it is essential to note that children are more likely to be traumatised by hostile situations because of their age, lack of maturity and vulnerability. In addition, a child is more likely to believe improbable threats and be terrified by unfamiliar circumstances, such as aggressive police questioning,

¹³⁵ See *Kraitman v. Canada (Secretary of State)* (1994), 81 F.T.R. 64 at 71-72, [1994] F.C.J. No. 1063 (T.D.)

¹³⁶ See *Sagharichi v. Canada (Minister of Employment & Immigration)* (1993), 182 N.R. 398 at 399-400, [1993] F.C.J. No. 796 (C.A.)

¹³⁷ See Memorandum from Jeff Weiss, Acting Director, Office of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS 23 (Dec. 10, 1998), online: U.S. Citizenship and Immigration Services <http://uscis.gov/graphics/lawsregs/handbook/10a_ChldrnsGdlns.pdf> at 11 [INS GUIDELINES]

¹³⁸ Joyce Koo Dalrymple, "Seeking Asylum Alone: Using The Best Interests of the Child Principle to Protect Unaccompanied Minors" (2006) 26 B.C. Third World L.J. 131 at 140

¹³⁹ See INS GUIDELINES, *supra* note 137 at 11; See UNHCR, *Handbook*, *supra* note 41, which states that “variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary” at para. 52.

¹⁴⁰ Jacqueline Bhabha & Wendy Young, “Not Adults in Miniature: Unaccompanied Child Asylum Seekers And The New U.S. Guidelines” (1999) 11 Int'l J. Refugee. L. 84 at nn. 98-106

¹⁴¹ *Ibid.* at nn. 98-103

handcuffing, slapping or rough handling that may not constitute as ‘serious harm’ for an adult. However, such circumstances could produce physical and psychological trauma in children, amounting to persecution for them.

Moreover, punishment, such as solitary confinement and life imprisonment, that might be considered as legitimate when applied to adults may constitute to persecution when inflicted on children.¹⁴² Furthermore, infliction of harm on close relatives of a child may become persecution for the child because of children’s heightened sensitivity.¹⁴³

To illustrate the second reason,¹⁴⁴ that is, persecution arises due to children’s heightened dependence, it is essential to note that children have particular needs for assistance and protection. Since parental care is established as a basic human right of a child in Article 7 of the CRC,¹⁴⁵ forced separation of a child from his or her parents or other family members may be considered as persecution for a child while such forced separation is not persecution for an adult. Moreover, depriving children of their social and economic rights, such as the opportunity to attend school, having access to health care, food or housing may be considered as violations amounting to persecutions.¹⁴⁶

¹⁴² *Ibid.*

¹⁴³ See *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994) (“[W]hen a young girl loses her father, mother and brother-sees her family effectively destroyed-she plainly suffers severe emotional and developmental injury” at 329). See especially UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 12 (The UN Committee has identified persecution of the kin as one of the child-specific forms and manifestations of persecution that may qualify for the granting of refugee status.); See *F.O.O. (Re)*, [2003] R.R.D.D. No. 83, Refugee Protection Division Decision, Nos. MA1-11675, MA1-11676, MA1-11677 (“Since young children, who are much more emotionally fragile than adults, are involved, the opinion of the panel is that the treatment imposed on their mother and the fact that young children are powerless in such circumstances, that is, the entire situation could have a persecutory effect on them” at para. 26)

¹⁴⁴ Bhabha & Young, *supra* note 140 at nn. 104-106

¹⁴⁵ CRC, *supra* note 22, art. 7 which states that “[t]he child shall...as far as possible, have the right to ...be cared for by their parents”.

¹⁴⁶ Bhabha & Young, *supra* note 140 at n. 106; See *A.L.J. (Re)*, *supra* note 72 (Here, to determine whether a 14 year old minor claimant has suffered persecution, the Board considered various international instruments. Particularly, the following were noted: article 25 of the *Universal Declaration of Human Rights*, which states that “Motherhood and childhood are entitled special care and assistance”, article 26 of the *Universal Declaration of Human Rights* that states that “Everyone has the right to education” and article 10 of the *International Covenant on Economic, Social and Cultural Right* that states that “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be

There are also other situations, in which children, in particular, may face serious harm. These situations include forced conscription, being trafficked for exploitation and female genital mutilation.¹⁴⁷ The UNHCR Executive Committee has also identified various types of harm to which refugee children can be particularly vulnerable.¹⁴⁸ These include: family separation, physical violence and other violations of their basic rights, including sexual abuse and exploitation, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention, irregular adoption and nutritional deficiency diseases and malnutrition.¹⁴⁹

The denial or violation of children's human rights detailed in the CRC¹⁵⁰ "can be seen as a standard of what might, if sufficiently serious, constitute persecution."¹⁵¹ In fact, in *T.C.V. (Re)*,¹⁵² the IRB of Canada finds guidance in the CRC in defining what human rights standards are accorded to children in international law, and whether a violation of those standards may constitute persecution. In this case, the principal claimant is a twelve-year old child, who bases his refugee claim to a well-founded fear of persecution in the United States and the United Kingdom on his membership in a particular social group, that being "young children victims of incest".¹⁵³ The IRB found that the child refugee claimant has been deprived of some of the basic rights of a child, including the rights enunciated in Articles 19 and 37 of the CRC.¹⁵⁴ The IRB found that

protected from economic and social exploitation...child labour should be prohibited and punishable by law". To determine whether the minor claimant was subject to persecution, the Convention Refugee Determination Division analysed her story and found that she was never sent to work, she was protected from economic and social exploitation and she was sent to school every day).

¹⁴⁷ Ayotte & Williamson, *supra* note 119 at 52

¹⁴⁸ UNHCR, *Children At Risk*, *supra* note 61 at 2

¹⁴⁹ *Ibid.*

¹⁵⁰ CRC, *supra* note 22

¹⁵¹ Ayotte & Williamson, *supra* note 119 at 53

¹⁵² *T.C.V. (Re)*, [1997] C.R.D.D. No. 5, Nos. U95-00646, U95-00647 and U95-00648 at para. 52

¹⁵³ *Ibid.* at para. 1.

¹⁵⁴ CRC, *supra* note 22, arts.19 and 37. Article 19 of the CRC states:

1. States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

the child refugee claimant was not spared from the long history of traumatic sexual abuse by his biological father. In addition, the IRB found this victimization was prejudicial to the child's dignity, well-being and to his life. The IRB concluded that the violation of the child's rights in this regard constitutes persecution within the meaning of the Convention refugee definition.¹⁵⁵

What might not be seen as persecutory in the case of an adult, may be very well be in the case of children, who are more vulnerable, dependent and powerless.¹⁵⁶ Hence, the varied type of harms that children particularly may fear or suffer could constitute persecution for them but not for adults.¹⁵⁷ Thus, these issues are relevant in the determination of well-founded fear of persecution of unaccompanied minors seeking asylum in Canada. Indeed, the refugee definition in the Refugee Convention "must be interpreted in an age and gender-sensitive manner, taking into account particular

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described therefore, and as appropriate, for judicial involvement.

Article 37 of the CRC states:

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

¹⁵⁵ *T.C.V. (Re)*, *supra* note 152 at para. 54. In this case, the child refugee claimant is an accompanied minor but a principal claimant who has to establish his well-founded fear of persecution. The adult claimants base their claims on their membership in a particular social group, that of a family unit. The panel determined his mother and step father to be Convention refugees based on the principle of family unity.

¹⁵⁶ See the discussion of the United Kingdom case *Jakitay v. SSHD*, (12658) unreported, IAT 15 November 1995 [*Jakitay*] in the following pages of my thesis. This decision recognises that children could suffer in situations where adult would not suffer.

¹⁵⁷ See *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 586, 2003 FCT 429 at para. 34 (In this case, the Federal Court referred to the UNHCR, *Handbook*, *supra* note 41, at para. 52 which indicated that "[d]ue to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary").

motives for, and forms and manifestations of, persecution experienced by children.”¹⁵⁸ With respect to child-specific forms and manifestations of persecution, the UN Committee remind States about the need for age and gender-sensitive asylum procedures and an age and gender sensitive interpretation of the refugee definition.¹⁵⁹

It is generally accepted now that the interpretation of the term ‘persecution’ should be based on the object and purpose of the Refugee Convention, which is meant to provide surrogate protection against the sustained and systemic denial of core human rights.¹⁶⁰ However, some authors argue to reform the refugee definition so that the concept of persecution will be effectively redundant, and thus, the world’s collective compassion could be directed at those who suffer deprivation at the greatest degree.¹⁶¹

At minimum, unaccompanied minors, who require special care and assistance, should benefit a reform of the refugee definition in Article 1A(2) of the Refugee Convention, and consequently, in section 96 of the *IRPA* so that ‘persecution’ is construed in a child-centred manner.

Moreover, participants at the ‘Workshop on Unaccompanied/ Separated Children’ recognised that in determining unaccompanied minors’ or separated children’s asylum claims, States have to deal with the issue of how to define child-centred persecution.¹⁶² Although age is not specified as a ground for persecution, children frequently suffer serious harm, especially from “non-state actors in the form of domestic

¹⁵⁸ UNICEF, *supra* note 28 at 15. See also UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 12

¹⁵⁹ UN Committee on the Rights of the Child, *Ibid.*

¹⁶⁰ Hathaway, *The Law of Refugee Status*, *supra* note 129

¹⁶¹ Bagaric & Dimopoulos, *supra* note 30 at 290-291 (Bagaric & Dimopoulos propose a new definition of a refugee, as a person whose life is in peril as a result of lack of food, water or shelter; or owing a well-founded fear of having his or her physical integrity or liberty violated; is outside the country of his or her nationality and is unable to avail himself or herself of the relevant resources or protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or unwilling to return to it. This definition of refugee has some similarities with the UN definition for internally displaced people: persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systemic violations of human rights or natural or man-made disasters: *Analytical Report of the Secretary-General on Internally Displaced Persons*, E/CN 4/19992/93, 14 February 1992 at para. 17)

¹⁶² Maloney, *supra* note 8 at 106. The participants of the Workshop included academics, practitioners, politicians, government officials, and representatives from international and non-governmental organizations from North America and Europe.

violence, severe neglect, forced military recruitment and forced labour or servitude.”¹⁶³ In fact, the UNHCR has recognized that “[u]naccompanied and separated girls and boys are at particular risk” of forced, compulsory or voluntary military recruitment.¹⁶⁴ It can be difficult for children to demonstrate that they cannot avail themselves of the protection of their home countries when they face persecution by non-state actors. For instance, children could face danger where their home government may be unable or unwilling to punish those who are committing the child abuse or to prevent children from being forced into military service; nevertheless, some asylum providing countries, like Germany, do not recognize non-state actors as agents of persecution, making it difficult for such children to obtain refugee protection.¹⁶⁵

Equally important, in the United Kingdom case of *Jakitay v. SSHD*,¹⁶⁶ the Immigration Appeal Tribunal (IAT) considered the meaning of the term ‘persecution’ as it relates to children. The IAT stated that the CRC¹⁶⁷ represents international consensus on the standard by which to assess international and national policies whereby disregarding the standard would amount to a failure to examine the composite question of whether the child’s freedom is threatened. The IAT reasoned that even though the determination of what is a ‘serious possibility’ or ‘reasonable likelihood’ of persecution has to be judged objectively such that objective judgement must specifically address the risks created by the facts as found and the background upon the minor, the tribunal concluded that the same matrix of facts for an adult refugee claimant do not necessarily lead to the same conclusions as they would for a minor refugee claimant.¹⁶⁸ This decision recognises that children could suffer in situations where adult would not suffer.¹⁶⁹ For instance, the loss of a parent, being a loss of the primary care-giver, can be

¹⁶³ *Ibid.*

¹⁶⁴ United Nations High Commissioner for Refugees (UNHCR), *Summary Note: UNHCR’s Strategy and Activities Concerning Refugee Children* (Geneva: UNHCR, 2005), Online: UNHCR<<http://www.unhcr.org/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3bb3107ba>> at 4

¹⁶⁵ Maloney, *supra* note 8 at 106

¹⁶⁶ *Jakitay*, *supra* note 156

¹⁶⁷ CRC, *supra* note 22

¹⁶⁸ *Jakitay*, *supra* note 156

¹⁶⁹ Simon Russell, *Most vulnerable of all: The treatment of unaccompanied refugee children in the UK* (London: Amnesty International, 1999) at 56

devastating to a child. Such a loss could amount to persecution because loss of a primary care-giver could lead to developmental harm, even up to the death of the child¹⁷⁰ if there is no positive act by State to provide adequate care to the child. However, it may be rare for the same facts to have the same meaning in the case of an adult.¹⁷¹

Nevertheless, in Canada, despite the broad definition of persecution in *Rajudeen v. Canada (Minister of Employment & Immigration)*,¹⁷² the definition of persecution does not take into account the differential impact that certain forms of harm may have on children. For instance, the UNHCR Guidelines on Unaccompanied Children¹⁷³ provide that certain human rights abuses may constitute persecution for children, but not for adults and that these abuses include the recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking¹⁷⁴ of children for prostitution and sexual exploitation and the practice of female genital mutilation. In fact, infanticide, child abuse, incest, child sale, child marriage and religious sexual servitude are also forms of persecution that are specific to children.¹⁷⁵

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* For a clear discussion of this issue, see Jacqueline Bhabha & Wendy A. Young, “Through a child’s eye: protecting the most vulnerable asylum-seekers” (1998) 75 Interpreter Releases 757

¹⁷² *Rajudeen*, *supra* note 73 at 133-134

¹⁷³ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at § 8.7. See especially UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, *supra* note 20 at 12 (The UN Committee has identified several abuses including persecution of the kin as some of the child-specific forms and manifestations of persecution that may qualify for the granting of refugee status when such acts relate to any one or more of the grounds of the Refugee Convention.)

¹⁷⁴ See United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and /or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, online: UNHCR<<http://www.unhcr.org/publ/PUBL/443b626b2.pdf>>, where with regard to trafficking, the UNHCR has emphasized that “the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking. Asylum claims lodged by victims of trafficking or potential victims of trafficking should thus be examined in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case. Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution” at 6.

¹⁷⁵ Bhabha & Young, *supra* note 140 at nn. 77-85

However, it should be kept in mind that ‘persecution’ implied in the refugee definition, in Article 1A(2) of the Refugee Convention, is same for adults and children and does not take into account that certain human rights abuses may constitute persecution for children but not for adults. Hence, there is a failure to construe ‘persecution’ in a child-centered way in the refugee definition of Article 1A(2) of the Refugee Convention.

2.3 Vulnerability of Unaccompanied Minors requires Special Consideration

Unaccompanied refugee children are vulnerable not only as refugees but also as children.¹⁷⁶ In the normal course, their human rights were initially violated, causing them to become refugees. They have been forced to flee their own country and to leave behind everything that is familiar, including their parents. As child refugees and unaccompanied by their parents, they are less able to protect themselves. Their flight itself leaves them open to violence, to disruption of community and social structures and to shortage of basic resources, thus affecting their physical and psychological development. It is important to remember that firstly, they are children, secondly, they are refugees, and lastly they are unaccompanied by their parents or legal guardians. Unaccompanied child refugees are the ‘invisible of the invisible’ because they bereft of support systems such as family life.¹⁷⁷ Therefore, they require special consideration and assistance to ensure their protection and well-being.

The UNHCR has noted that

Refugee children are children first and foremost, and as children, they need special attention. As refugees, they are particularly at risk with the uncertainty and unprecedented upheavals which are increasingly marking the post-Cold War era.¹⁷⁸

The UNHCR Executive Committee has recognized the “special needs and vulnerability”, particularly, “those of unaccompanied and separated children”.¹⁷⁹ Likewise, Justice Kirby of the High Court of Australia has noted that children are the

¹⁷⁶ Russell, *supra* note 169 at 9

¹⁷⁷ *Ibid.*

¹⁷⁸ UNHCR, *Refugee Children: Guidelines*, *supra* note 42

¹⁷⁹ UNHCR, *Children At Risk*, *supra* note 61 at 2

most vulnerable groups of refugees, requiring special need of the protection of the Refugee Convention, where they arrive in a country of refuge without their parents or guardians.¹⁸⁰

Similarly, Professor Goodwin-Gill notes that refugee unaccompanied minors, “may require *special protection* by reason of their personal, legal or social situation, including the experience of flight, the trauma they have experienced, and the immediate need to find care in a nurturing environment”.¹⁸¹ He highlights that children’s entitlement to “*special protection* derives in part from the specific context of the 1949 Geneva Conventions and international humanitarian law – the laws of war”.¹⁸²

Importantly, the international community has decided that children require and are legally entitled to all the applicable rights in the CRC¹⁸³ and that these rights have to be applied without discrimination.¹⁸⁴ Despite the adoption of the CRC, it is becoming increasingly difficult for child refugees to find places of safety¹⁸⁵ because asylum providing states are increasingly attempting to restrict entry to asylum seekers and characterize them as false asylum seekers. In addition, many child refugees and unaccompanied child asylum seekers continue to suffer the effects of war and exploitation.¹⁸⁶

To process refugee claims of minors, the IRB has set up special Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues.¹⁸⁷ The Guidelines, though

¹⁸⁰ *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* (2000), 170 A.L.R. 553 (Austl.) at para. 76

¹⁸¹ Guy S. Goodwin-Gill, “Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions” (1995) 3 Int’l J. Child. Rts. 405 at 413

¹⁸² *Ibid.*

¹⁸³ CRC, *supra* note 22

¹⁸⁴ Russell, *supra* note 169 at 9

¹⁸⁵ *Ibid.* at 10; See United Nations High Commissioner for Refugees, *The State of the World’s Refugees: a Humanitarian Agenda 1997-8: A Humanitarian Agenda* (New York: Oxford University Press Inc., 1998) (Written in relation to refugees generally and therefore also in relation to child refugees)

¹⁸⁶ Crystal J. Gates, “Working Toward a Global Discourse on Children’s Rights: The Problem of Unaccompanied Children and the International Response to Their Plight” (1999) 7 Ind. J. Global Legal Stud. 299

¹⁸⁷ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12. These Guidelines address the specific procedural issue of designation of a representative and the more general procedural

not legally binding, are established to set up a framework to take into account the special needs of unaccompanied minors in the refugee determination process. For instance, according to the Guidelines, claims from minors should be prioritized, a designated representative has to be appointed to accompany and provide support to a minor claimant throughout all proceedings of the refugee claim, panel members should be selected based on their experience in dealing with children, the age and mental development of the child should be considered, an informal environment should be created during the refugee hearing, children should be questioned in a sensitive manner by the IRB members, and as far as possible, hearings should be limited to a single sitting.¹⁸⁸

Despite the good intentions of the IRB Guidelines, their actual implementation has been the source of concern for professionals involved directly or indirectly with the refugee determination process.¹⁸⁹ Some of the weaknesses include inappropriate forms of questioning, the uneasiness of some minors in telling their stories, lack of facility by some IRB members in communicating with children, the lack of understanding of the impact of trauma, personality, and cultural background on a child's testimony; and contradictions between the testimony of the designated representative and that of the child.¹⁹⁰ In fact, in *Duale v. Canada (Minister of Citizenship and Immigration)*,¹⁹¹ an unaccompanied minor who was 16 years old was not represented by a designated representative when the minor filled his Personal Information Form for a refugee claim. The Federal Court of Canada ruled that designation of a representative could have affected the outcome of that case.¹⁹² Therefore, the weaknesses identified in the refugee

issue of the steps to be followed in processing claims by unaccompanied children. As well, the Guidelines will also address the evidentiary issues of eliciting evidence in a child's claim and assessing that evidence.

¹⁸⁸ *Ibid.*

¹⁸⁹ Catherine Montgomery, "The Brown Paper Syndrome: The Unaccompanied Children and Questions of Status" *Refuge* 20:2 (Feb 2002) 56, online: Centre for Refugee Studies, York University <<http://www.yorku.ca/crs/Refuge/Abstracts%20and%20Articles/Vol%2020%20No%202/montgom.pdf> >

¹⁹⁰ Ayotte, *supra* note 19

¹⁹¹ *Duale v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 150, IMM-6712-02, at para. 12-13

¹⁹² *Ibid.* at para. 21

determination process call into question the right to a just hearing and constitute another significant barrier to establishing decent life conditions for minor refugee claimants.¹⁹³

Although the IRB Guidelines are meant to provide greater procedural protection to children's refugee claims, yet more has to be done to modify the substantive asylum law in Canada to respect the best interests of the child principle advocated by the CRC¹⁹⁴ and the UNHCR Guidelines on Unaccompanied Children.¹⁹⁵ In other words, the question remains whether the applicable criteria in the refugee determination system should be modified to respect the best interests of unaccompanied minors seeking refugee status in Canada.

The IRB Guidelines support the position of the UNHCR Guidelines on Refugee Children which provide that

where a child is not mature enough to establish a well-founded fear of persecution in the same way as an adult 'it is necessary to examine in more detail objective factors, such as the characteristics of the group the child left with[,] the situation prevailing in the country of origin and the circumstances of family members, inside or outside the country of origin'.¹⁹⁶

Quoting these Guidelines of the UNHCR, the IRB Guidelines in Canada recognise that "[a] child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant" and that "it may be necessary to put more weight on the objective rather than the subjective elements of the claim".¹⁹⁷ Moreover, the IRB Guidelines recognise that "children may manifest their fears differently from adults".¹⁹⁸ However, the IRB Guidelines are not law¹⁹⁹ and, as noted by Professor Bridgette A. Carr, arguably, decision makers could use their discretion to ignore the subjective element requirement of the well-founded fear analysis for children without mentioning it

¹⁹³ Montgomery, *supra* note 189

¹⁹⁴ CRC, *supra* note 22, art. 3

¹⁹⁵ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at 1

¹⁹⁶ UNHCR, *Refugee Children: Guidelines*, *supra* note 42

¹⁹⁷ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12

¹⁹⁸ *Ibid.*

¹⁹⁹ *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 55 at para. 12 (T.D.) [*Narvaez*]; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 168, 2006 FC 16 at para. 89 [*Thamotharem*]

explicitly in their decisions.²⁰⁰ Nevertheless, decision makers can exercise their independent decision-making authority as these Guidelines are not legally binding on IRB members.²⁰¹ For this reason, although unaccompanied minors may be too young to articulate their subjective fear, this subjective element requirement of the well-founded fear analysis is not eliminated in the case of unaccompanied minors seeking asylum in Canada.

Moreover, only few courts, namely in Canada, Australia and in the United Kingdom have explicitly declared that children should be exempted from the subjective element of the well-founded fear analysis. For instance, in *Yusuf v. Canada (Minister of Employment & Immigration)*,²⁰² Justice Hugessen, writing for the Federal Court of Appeal, has stated that a young child “was incapable of experiencing fear the reasons for which clearly exist in objective terms”. With this statement, he had noted the irrationality of using the absence of subjective fear as a basis to deny refugee protection to a child who has established objective risk of persecution.²⁰³

Likewise, the Federal Court of Australia stated that “[a]bsent any subjective fear then (infants and incapable persons apart) there can be no question whether there is a well-founded fear”.²⁰⁴ With this statement, the Court explicitly exempted infants and incapable persons from the subjective element requirement of the well-founded fear analysis because they cannot enunciate or may not even have the capacity to form a subjective fear. Similarly, in *R (on the application of Osmani) v. An Immigration Adjudicator and Another*, a decision from the United Kingdom, the court, while reviewing a claim from a separated minor from Yugoslavia, stated that

account should be taken of the applicant’s maturity and in assessing the claim of a child more weight should be given to the objective indications of risk than to the child’s state of mind and understanding of the situation. Further that [asylum claim] should not be

²⁰⁰ Brigitte A. Carr, “We Don’t Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-founded Fear Analysis for Child Refugee Applicants” (2006) 33 Pepp. L. Rev. 535 at 560

²⁰¹ *Thamotharem*, *supra* note 199 at para. 102

²⁰² *Yusuf v. Canada (Minister of Employment & Immigration)*, [1992] 1 F.C. 629 at 632, Hugessen J.A (C.A.) [*Yusuf*]

²⁰³ *Ibid.*

²⁰⁴ *Raza v. Minister for Immigration and Multicultural Affairs* (2002), F.C.A. 350 (Austl.) at para. 7

refused solely because the child is too young to understand the situation to have formed a well-founded fear of persecution.²⁰⁵

Nevertheless, in Canada, section 96 of the *IRPA*²⁰⁶ requires both subjective and objective elements of the well-founded fear for all refugee claimants to qualify for refugee status, without exempting unaccompanied minors explicitly from the subjective element requirement, despite their vulnerability which calls for special consideration. This is because the Supreme Court of Canada made it clear in *Ward*²⁰⁷ that both subjective element and objective element are required to establish the well-founded fear of persecution of a refugee claimant.

2.4 Two Elements requirement for Well-Founded Fear is not child-centered

The traditional bipartite test that requires demonstration of subjective fear and objective fear to assess well-founded fear of persecution, fails to be child-centred when it is applied to unaccompanied minors seeking asylum in Canada because it fails to consider that unaccompanied minor claimants, who had undergone a trauma while leaving their country of origin, may not always be able to “verbalising their feelings” to adequately demonstrate the subjective element of their well-founded fear.²⁰⁸ In addition, the traditional approach of two elements requirement disregards that a child may be genuinely at risk of persecution but not able to understand that he should be fearful to demonstrate his fears, thus, not satisfying the subjective element and, consequently, he or she may be denied of refugee protection even though there may be objective evidence of real chance of persecution.

Similarly, the UNHCR noted that “[c]hildren’s dependency on others for life, survival and development may render them vulnerable to abuse and exploitation by

²⁰⁵ *R (on the application of Osmani) v. An Immigration Adjudicator & Another*, [2001] EWHC (Admin) 1087, [1]-[15] (Eng.) at para. 4

²⁰⁶ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96; See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27)

²⁰⁷ *Ward*, *supra* note 31 (“...the test is bipartite: 1) the claimant must subjectively fear persecution; and 2) this fear must be well-founded in an objective sense” at para. 47).

²⁰⁸ Bueren, *supra* note 39 at 364

adults and can make them less willing or able to express their fears and needs.”²⁰⁹ Children’s age and maturity is also linked to this inability or unwillingness.²¹⁰

Determining the refugee status of unaccompanied children is more difficult and requires special consideration because where a child’s testimony is important, a child may be regarded as sufficiently mature to be able to express a well-founded fear of persecution.²¹¹ However, an unaccompanied child may unwittingly damage his or her case by trying to appear brave and minimising the actual danger or events, and hence, putting his or her determination of refugee status at risk.²¹² The UNHCR Guidelines on Refugee Children provides that a case on unaccompanied minor child seeking asylum may be treated in a similar manner to that of an adult if “it is decided that the child is mature enough to have and to express well-founded fear of persecution”.²¹³ However, in practice, it may be difficult to assess accurately when a child is mature because a child may wish to appear brave due to their cultural backgrounds and the persons determining the child’s maturity may be also from different cultural backgrounds. Moreover, unaccompanied refugee minors are always vulnerable due to their age as children.²¹⁴ Their maturity, gained because of their traumas they had gone through, is different from vulnerability.²¹⁵

The problem of unaccompanied minors not being able to adequately establish the subjective element of well-founded fear could also be heightened by those who are investigating the child’s claim being unable to speak in the child’s mother tongue.²¹⁶ For this reason, while determining the refugee status of unaccompanied children, the UNHCR recommends that the expert must have the same cultural background and

²⁰⁹ UNHCR, *Children At Risk*, *supra* note 61 at 2

²¹⁰ *Ibid.*

²¹¹ Bueren, *supra* note 39 at 364

²¹² *Ibid.*

²¹³ UNHCR, *Refugee Children: Guidelines*, *supra* note 42 at 43

²¹⁴ Bueren, *supra* note 39 at 360

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* at 364

mother tongue as the child.²¹⁷ Yet, in practice, this may not be always possible in states, like Canada. Furthermore, deciding upon refugee claims may be the “single most complex adjudication function in contemporary Western societies” since the complexity requires the need for the decision-maker to have sufficient knowledge of the cultural, social and political environment of the country of origin of the refugee claimants.²¹⁸ On the other hand, the UNHCR Handbook²¹⁹ provides that minors under the age of sixteen “may normally be assumed not to be sufficiently mature”; therefore, their fear and “will of their own” may not have the same significance as in the case of an adult. It also requires that in all cases, an unaccompanied minor’s mental maturity must always be determined based on his or her personal, family and cultural background.²²⁰ However, in reality, this can be difficult to determine in one sitting of the hearing process due to varied cultural backgrounds of child refugee claimants and that of the decision-makers.

Importantly, the UNHCR Handbook recommends that “where the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors.”²²¹ In other words, this recommendation implies that children who have reached a sufficient age of maturity should be required to establish their subjective fear of being persecuted. Regarding the method by which decision makers determine which children have reached a sufficient age of maturity, the UNHCR suggests that courts should consider a child’s age, level of education, and understanding of need to tell the truth.²²² Hathaway points out that age and level of education may not accurately indicate a child’s capacity to express his or her fear, particularly in a foreign

²¹⁷ UNHCR, *Refugee Children: Guidelines*, *supra* note 42 at 43; See also Citizenship and Immigration Canada, *PP1: Processing Claims for Refugee Protection in Canada*, *supra* note 11 (The Citizenship and Immigration Canada recommends in its interviewing guidelines when dealing with minor children that immigration “[o]fficers should be conscious of cultural and gender issues that may affect communication, including both verbal and non-verbal signals” at 66).

²¹⁸ François Crépeau, France Houle & Patricia Foxen, “The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board” (2002) 15 J. Refugee Stud. 43 at 42

²¹⁹ UNHCR, *Handbook*, *supra* note 41 at para. 215

²²⁰ *Ibid.* at para. 216

²²¹ *Ibid.* at para. 217

²²² Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status* (UNHCR New Issues in Refugee Research, Working Paper No. 68, Oct. 2002)

environment and to a stranger.²²³ Likewise, he explains that a child's willingness to tell the truth, which may be relevant in other areas of law as to the child's capacity to testify in court, seems to have very little to do with his or her capacity to express fear.²²⁴ Therefore, the absence of any principled method of determining which minors are exempted from establishing their subjective fear requirement puts an amount of arbitrariness in the refugee status determination of unaccompanied minors. Such arbitrariness is also not acceptable due to the extraordinary cost of error.²²⁵ For this reason, all unaccompanied minors below the age of eighteen²²⁶ should be exempted from the requirement of subjective fear to establish their well-founded fear.

Furthermore, the bipartite test for well-founded fear, which requires demonstrating subjective fear and objective fear, is not universally accepted.²²⁷ For example, Hathaway maintains that the traditional bipartite test is historically unfounded, illogical, dangerous, and yields no net benefit to refugees.²²⁸ He noted that an analysis of the drafting history of the Refugee Convention clearly points out that 'fear' should not be an examination of the emotional state of the mind of the claimant but must be used to mean a prospective assessment of risk.²²⁹ Hathaway also maintains that fear may indicate an anticipatory assessment of risk instead of referring to a form of emotional

²²³ Hathaway & Hicks, *supra* note 31 at 522

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ The age of eighteen is suggested here in accordance with Article 1 of the *Convention on the Rights of the Child*: "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". See CRC, *supra* note 22

Although in Canada, the definition of a minor child varies according to province, in the federal context and according to the CRC, a child is a person under the age of eighteen years. Only in Saskatchewan and in Newfoundland, a person under 16 years old is considered to be a minor child. In all other provinces, a minor child is a person under 18 or 19 years old. For instance, in Alberta, Manitoba, Ontario, Québec and in Prince Edward Island, a person under 18 years old is a minor child. Whereas, in British Columbia, Nova Scotia, New Brunswick, Northwest Territories, Yukon and in Nunavut, a minor child is a person under 19 years old. With regard to children between the ages of 16 and 18 years old, several provinces do not consider 16 and 17 years old children to be within the jurisdiction of child protection agencies. Nevertheless, this does not change the fact that they are considered to be children in the federal context and according to the CRC: See Citizenship and Immigration Canada, *PPI: Processing Claims for Refugee Protection in Canada*, *supra* note 11 at 59 and 68.

²²⁷ Adjin-Tettey, "Reconsidering", *supra* note 62 at 130

²²⁸ Hathaway, *The Law of Refugee Status*, *supra* note 129 at 66-71

²²⁹ *Ibid.* at 66

response. He argues that seeing ‘fear’ as an anticipatory assessment of risk is consistent with the term “craignant avec raison d’être persécuté” employed in the original French text of the Refugee Convention.²³⁰

Moreover, Hathaway argues that requiring evidence of a subjectively internalised fear is illogical and could lead to absurd results because it results in differential treatments for persons identically situated, but whose individual temperament or tolerance is different.²³¹ Persons identically situated may receive differential treatment on the basis of how best each person articulates his perception of the threat of persecution, in spite of convincing objective evidence pointing to a risk of persecution for him. This would mean that in a given circumstance, the stoic may not be given refugee protection because he is not perceived to exhibit his subjective fear of persecution arising from the objective evidence, whereas, a person exhibiting a ‘fearful will’ would be accorded refugee protection.

Likewise, unaccompanied minors, being not able to articulate their perception of the threat of persecution, though there may be objective evidence of a risk of persecution, would risk denial of refugee protection. Hence, the traditional bipartite test, which requires evidence of subjectively internalised fear from unaccompanied minors, is illogical and could lead to absurd results for them. Furthermore, child refugee claimants, being more vulnerable than adults, require special consideration and differential treatment than adult refugee claimants because any achievement of equality in rights protection between children and adults will have to recognize the difference between children and adults, where such difference is based on the drawing of valid distinctions between the two groups.²³²

In addition, the traditional bipartite test fails to be child-centered because in *Yusuf v. Canada (Minister of Employment & Immigration)*,²³³ the Federal Court of Appeal pointed out that relying on the traditional bipartite test would imply that children and the mentally disabled cannot have a well-founded fear of persecution because they

²³⁰ *Ibid.*

²³¹ *Ibid.* at 69

²³² Claire Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Leiden: Martinus Nijhoff Publishers, 2006) at 12 [Breen, *Age Discrimination*]

²³³ *Yusuf*, *supra* note 202 at 631-632

cannot internalize the harm feared [subjective element] even though there is a strong objective basis for fear of persecution. Therefore, relying on the traditional bipartite test for unaccompanied minors could mean that courts could refuse refugee status being accorded to unaccompanied minors if there is insufficient proof of subjective fear although the case has strong objective element. Furthermore, in *Yusuf*,²³⁴ Justice Hugessen rejected the traditional bipartite test by holding that the requirement of subjective fear will not stand in the way of recognizing the refugee claim of a child. In fact, it is clear from this decision that the subjective element of well-founded fear should be dispensed with if insisting on it would lead to denial of refugee protection in objectively well-founded claims of unaccompanied minors. Although *Yusuf*²³⁵ rejected the requirement of the subjective element, this decision is not a precedent because the Supreme Court in *Ward*²³⁶ made it clear that both elements, subjective and objective, are required for the well-founded fear of persecution of a refugee claimant.

Therefore, decision-makers at the IRB do insist on the subjective element as well as the objective element to determine the well-founded fear of persecution for minors. For instance, in *Gebremichael v. Canada (Minister of Citizenship and Immigration)*,²³⁷ the Federal Court found that the Refugee Protection Division of the IRB had drawn an adverse inference with respect to a minor claimant's subjective fear. The Court ruled that the IRB had failed to consider the age and cultural background of the minor claimant.²³⁸ Furthermore, the IRB had also assessed the reasonableness of minor claimant's explanation from its own perspective rather than the minor's.²³⁹ The Federal Court cited *R.K.L. v. Canada (Minister of Citizenship and Immigration)*²⁴⁰ and noted that the IRB should not be quick to apply the North American logic and reasoning to a

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ward*, *supra* note 31 ("...the test is bipartite: 1) the claimant must subjectively fear persecution; and 2) this fear must be well-founded in an objective sense" at para. 47).

²³⁷ *Gebremichael v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 547, [2006] F.C.J. No. 689 at para. 46. [*Gebremichael*] The name of the minor claimant referred here is Hiwote.

²³⁸ *Ibid.* at para. 49

²³⁹ *Ibid.* at para. 48

²⁴⁰ *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] F.C.J. No. 162

claimant's behaviour, rather consideration should be given to the claimant's age, cultural background and previous social experiences.

It should be noted that it may be difficult for unaccompanied minors to satisfy the subjective element of the well-founded fear, considering the varied backgrounds and cultures of the claimants and that they have distinctive ways of expressing emotional reactions.²⁴¹ Furthermore, Canadian decision makers assess subjective assessment of risk predominantly with a Western standard to conclude whether a claimant has established sufficient subjective fear of persecution.²⁴² Their assessment of subjective fear could also be influenced by the decision maker's own cultural background and values.²⁴³ For these reasons, the traditional bipartite test of well-founded is not child-centred because it disregards that unaccompanied minors cannot internalise harm to adequately establish subjective element but still requires them to demonstrate it.

2.5 Inferences of lack of Subjective Fear should not be drawn from Minors' Conduct

There are mechanisms, though not logically connected to the existence of fear, whereby inferences can be drawn from pre-application conduct of a claimant to conclude his lack of subjective fear.²⁴⁴ This is because section 96 of the *IRPA*,²⁴⁵ which incorporates the definition of refugee from the Refugee Convention²⁴⁶ directly into the immigration law in Canada,²⁴⁷ indicates that refugee claimants must show by their conduct and actions "that they really do fear persecution in their country, and that the fear is based on objective and verifiable evidence".²⁴⁸ Therefore, in the opinion of decision-maker at the refugee determination process, the subjective element is deemed

²⁴¹ See Adjin-Tettey, "Reconsidering", *supra* note 62 at 131

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Hathaway & Hicks, *supra* note 31 at 525

²⁴⁵ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

²⁴⁶ Refugee Convention, *supra* note 30, art. 1A(2)

²⁴⁷ Waldman, *Canadian Immigration & Refugee Law Practice*, *supra* note 34 at 284

²⁴⁸ Jarada, *supra* note 63 at para. 23

not to be satisfied if a refugee claimant has behaved in a way that seems to be inconsistent with the presence of fear and hence, the refugee status will be denied.²⁴⁹ Lack of subjective fear is inferred by the decision maker in number of situations such as in : 1) applicant's delay in claiming refugee status; 2) applicant's failure to claim asylum in an intermediate country; 3) applicant's delay in fleeing the country of origin; 4) applicant's engagement in preflight conduct which increased his or her risk of being persecuted; and 5) applicant's return travel to his country of origin, where this is treated as evidence that he does not fear being persecuted there.²⁵⁰

Firstly, courts can infer lack of subjective fear from an applicant's delay to claim refugee status.²⁵¹ This is because people truly fearing persecution would claim refugee status at the first available opportunity.²⁵² For this reason, the Federal Court of Canada had stated that "delay points to a lack of subjective fear of persecution".²⁵³ In addition, in *Gebremichael v. Canada (Minister of Citizenship and Immigration)*, the Court found that "the delay, while not a decisive factor, did show behaviour that was inconsistent with a subjective fear of persecution".²⁵⁴

However, drawing inference of lack of subjective fear for delay in claiming refugee status in the case of unaccompanied minors would be even more detrimental to their protection. Unaccompanied minors could delay in claiming refugee status because of their age, lack of maturity and fear of confronting authorities with their plight because they might have bad experiences in their home country with governmental authorities, hence, they would not easily trust persons with authority. For instance, it is recognized by the CIC that "some children are shy" and "[o]ther children may have a fear of authority figures."²⁵⁵ Moreover, as noted by Kate Halvorsen, Senior Policy Advisor to

²⁴⁹ Hathaway & Hicks, *supra* note 31 at 525

²⁵⁰ *Ibid.* at 525-531

²⁵¹ *Ibid.* at 525; See *Kamana*, *supra* note 35

²⁵² *Castillejos v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1956, IMM 1950-94, Cullen, J. (T.D)

²⁵³ *Ibid.*

²⁵⁴ *Gebremichael*, *supra* note 237 at para. 45

²⁵⁵ Citizenship and Immigration Canada, *PPI: Processing Claims for Refugee Protection in Canada*, *supra* note 11 at 66.

Separated Children in Europe Programme, although separated children, in all western and central European countries, are legally entitled to apply for asylum or to have their guardians to do so on their behalf, however, in practice, “[t]hey may not know how to apply, be in the wrong place, fail to meet application deadlines or be wrongly advised not to apply by those who consider they are sufficiently protected within the child welfare system.”²⁵⁶

For instance, in *Lorne v. Canada*,²⁵⁷ the IRB inferred lack of subjective fear because the claimant delayed in claiming refugee status, when she first entered Canada when she was eighteen. In fact, she delayed making a refugee claim for over three years after she entered Canada illegally because she attempted to marry a Canadian to obtain status but when her boyfriend became abusive, she went to a women’s shelter and applied for refugee status. She also failed to apply for protection in the United States before coming to Canada. Although she orally testified that her father raped her over a six year period, once or twice a week, the IRB concluded that “she could have tried to obtain protection in Jamaica, but she did not make a determined effort”.²⁵⁸ The Federal Court found the IRB’s decision to be unreasonable, following the rationale in *Zhu v. Canada (Minister of Citizenship and Immigration)*,²⁵⁹ stating that the reasonableness of the applicant’s willingness to seek protection of the state must be assessed in light of their status as minors. The Court added that child applicants may be less inclined to seek the protection of the state.²⁶⁰

The second mechanism by which courts can infer lack of subjective fear from pre-application conduct is when refugee claimants had failed to claim asylum in an intermediate country.²⁶¹ Refugee claimants may have to explain why they did not claim

²⁵⁶ Kate Halvorsen, “Separated Children seeking asylum: the most vulnerable of all” *Forced Migration Review* 12 (January 2002) 34 at 35, online: Reliefweb
<http://www.reliefweb.int/library/RSC_Oxford/data/FMR/English/FMR12/fmr12.12.pdf>

²⁵⁷ *Lorne v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 384, [2006] F.C.J. No. 487 at para. 13 [*Lorne*]

²⁵⁸ *Ibid.*

²⁵⁹ *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 884, [2001] F.C.J. No. 1251 at para. 28 [*Zhu*]

²⁶⁰ *Ibid.*

²⁶¹ Hathaway & Hicks, *supra* note 31 at 526

refugee status in an intermediate country. Here, there is an underlying presumption that only persuasive explanation can rebut the inference that delay is an indicator of lack of subjective fear.²⁶² However, there is no logical connection between absence of subjective fear and failure of the claimant to seek refugee protection in intermediate countries. In fact, in Canada, the Federal Court of Appeal had ruled that a refugee claimant's failure to claim refugee status in intermediate countries was reasonable taking into consideration of his desire to have significant distance between himself and his persecutors, to seek refugee protection in an asylum country with good human rights record, and to choose to live in an English-speaking country.²⁶³ Similarly, the United States Court of Appeals had also rejected the logic of the presumption that genuine refugee claimants should claim refugee protection in the first intermediate country, and reaffirmed that it did not find the refugee's behavior, to seek out an asylum country with best opportunities, to be inconsistent with his subjective fear of persecution.²⁶⁴

Furthermore, in *Sinnathurai v. Canada (Minister of Citizenship and Immigration)*,²⁶⁵ the Federal Court of Canada had explained that although the claimant's delay in claiming refugee status and traveling to different countries without claiming refugee status would constitute significant factors, however, they were not in and of themselves conclusive because the IRB has to include the claimant's explanation of delay, and, thereby, the IRB had failed to assess the credibility of the claimant's refugee claim. In this case, the refugee claimant, who faced extortion at the hands of Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, came to Canada in July 2001 and stayed until March 2002 without making a refugee claim. Thereafter, she visited several other countries to see her children whom she had not seen for several years, before returning to Canada in June 2002 and making a refugee claim then.

Inference of lack of subjective fear of persecution should not be applied to minors when an unaccompanied minor fails to claim refugee status in the first

²⁶² See *Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, [1989] 8 Imm. L.R. (2d) 106, [1989] F.C.J. No. 442 (C.A.)

²⁶³ *Ibid.*

²⁶⁴ *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003)

²⁶⁵ *Sinnathurai v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 515, [2005] F.C.J. No. 653, Shore, J.

intermediate country before arriving in Canada. In fact, refugee claimants are not required by the Refugee Convention or by the Refugee Protocol to seek refugee protection in the first intermediate country after their flight from their country of origin.²⁶⁶ The Conclusion 15 of the Executive Committee of the UNHCR qualifies in principle the right of a refugee to choose his or her country of asylum.²⁶⁷ However, it provides for the principle that it may be reasonable for the refugee claimant to claim refugee protection in a country where he has connection or close links.²⁶⁸ This leads to a consequence that if the latter states were to decline refugee protection, then other states have to consider the claimant's refugee application in the normal manner. For this reason, in *Ilie v. Canada (Minister of Citizenship & Immigration)*,²⁶⁹ the Court upheld the decision of the Convention Refugee Determination Division of the IRB to draw inference of lack of fear of persecution because the applicant had traveled through Italy, France and Belgium over a period of eight months before coming to Canada to claim refugee status.

However, while the failure to claim elsewhere may be relevant, it should not be determinative.²⁷⁰ The tribunal should also consider the plausible explanation given for the failure to claim refugee protection in intermediate states. The test for the plausibility of the claimant's explanation should be liberal where considerations such as compatibility, convenience, asylum's country's reputation for respecting human rights, claimant's preference to maintain further distance from his persecutor can be considered.²⁷¹

Considering the special needs of unaccompanied minors seeking asylum, even if a minor is unable to offer a plausible explanation for his or her failure to seek refugee protection in the first intermediate country, this should not in any case be determinative of

²⁶⁶ Waldman, *The Definition of Convention Refugee*, *supra* note 86 at para. 8.32

²⁶⁷ UN EXCOM (The Executive Committee on the International Protection of Refugees), *No. 15 (XXX) Conclusion on Refugees Without An Asylum Country*, 30th Sess., (1979), online: UNHCR <<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> 22 at para. (h)(iii)-(iv)

²⁶⁸ *Ibid.*

²⁶⁹ *Ilie v. Canada (Minister of Citizenship & Immigration)* (1994), 88 F.T.R. 220 at 223 (T.D.)

²⁷⁰ *Gavryushenko v. Canada (Minister of Citizenship & Immigration)*, [2000] A.C.F. No. 1209 (F.C.A.)

²⁷¹ Waldman, *The Definition of Convention Refugee*, *supra* note 86 at para. 8.37

the claim. Indeed, the claim should only be established by other testimony or documentary evidence showing that the minor claimant is at risk of persecution. In fact, some of the duties of the designated representative towards a child refugee claimant include assisting in obtaining evidence in support of the child's claim, providing evidence and being a witness in the claim and informing the child about the various stages and proceedings of the claim.²⁷² Therefore, inference of lack of subjective fear should not be drawn from unaccompanied minors seeking asylum in Canada even if the minor is unable to give plausible explanation for his or her failure to claim refugee protection in the intermediate countries before arriving at Canada and making a refugee claim.

In fact, in *El-Naem v. Canada (Minister of Citizenship & Immigration)*, in the case of a 19 year old claimant who failed to claim refugee protection in Greece for one year for fear of deportation if his refugee claim were to fail but came to Canada later to seek refugee status, the Court said that "[i]t is too heavy a burden to place on a young person, impecunious and on his own, in a strange land with strange customs and language, and without family support, to assume he would inevitably act in a manner that reasonable persons, secure in Canada, might regard as the only rational manner".²⁷³ Here, the Court accepted the 19 year old claimant's explanation to be plausible and not to be irrational for failing to claim refugee protection in Greece for fear of failure in the refugee claim there and being deported back to his country of origin to face persecution.

Likewise, even if an unaccompanied minor is not able to give plausible explanation for failing to claim refugee protection in the first intermediate country, courts inferring lack of subjective fear from the pre-application conduct of an unaccompanied minor claimant would be placing a heavy burden on a child, who does not have his or her parents or legal guardians to guide and advise on the reasonable measures to pursue.

²⁷² IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12 at 3

²⁷³ *El-Naem v. Canada (Minister of Citizenship & Immigration)* (1997), 126 F.T.R. 15 at 19-21 (T.D.)

In fact, as noted by the Committee on the Rights of the Child,²⁷⁴ which is a monitoring body set up by the CRC,²⁷⁵ there is absence of standard procedures for the appointment of legal guardians for unaccompanied minors seeking asylum in Canada.²⁷⁶ Furthermore, the Committee has recommended Canada to implement a process for the appointment of guardians and to clearly define the nature and scope of such guardianship.²⁷⁷ Moreover, the Committee was concerned by the absence of adequate training and lack of consistent approach by the federal authorities in referring vulnerable children to welfare authorities.²⁷⁸

The third mechanism by which courts can infer lack of subjective fear from pre-application conduct is when a refugee claimant delays in fleeing his country of origin.²⁷⁹ Children often do not leave their country of origin on their own initiative but they are usually sent out by their parents or primary caregivers.²⁸⁰ Evidence of delayed flight of an unaccompanied minor from his country of origin should not be used as inference of lack of subjective fear because parents may not always be able to send off their minor children alone at the earliest possible opportunity. This could be due to a large number of factors, including their hesitation to send off their children alone to another country, hoping that things might change for better in their country of origin, or they may have been in hiding with their children, or they may be watched by their persecutors or they or their children may have been sick or injured. Furthermore, it may be psychologically

²⁷⁴ See CRC, *supra* note 22, arts. 43 and 44, which set up a monitoring mechanism that requires States Parties to submit reports to a body of experts (the Committee on the Rights of the Child) for its evaluation.

²⁷⁵ *Ibid.*

²⁷⁶ Cynthia Price Cohen, *Jurisprudence on the Rights of the Child*, Vol. III (Ardsey: Transnational Publishers Inc., 2005) at 2826 [Cohen, *Jurisprudence*, Vol. III]; UN Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations: Canada*, 27 October 2003, UN doc. CRC/C/15/Add.215, online: UNHCR Refworld© <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=403a22804>> [UN Committee on the Rights of the Child, *Concluding Observations*]

²⁷⁷ Cohen, *Jurisprudence*, Vol. III, *ibid.* at 2826-2827; UN Committee on the Rights of the Child, *Concluding Observations*, *ibid.*

²⁷⁸ Cohen, *Jurisprudence*, Vol. III, *ibid.* at 2826; UN Committee on the Rights of the Child, *Concluding Observations*, *ibid.*

²⁷⁹ Hathaway & Hicks, *supra* note 31 at 528

²⁸⁰ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at 13

very difficult for parents and their minor children to depart from each other. Alternatively, they may not be having enough money and they may have to arrange funds from relatives and friends, and this would take some time, delaying the unaccompanied minors from fleeing their country of origin at the earliest opportunity, even if the minors were to have the necessary travel documents and visas to flee to another country to seek refugee protection. Therefore, any number of circumstances could delay unaccompanied minors from fleeing their country of origin without indicating an absence of fear.

For instance, in *Mejia v. Canada (Minister of Citizenship and Immigration)*,²⁸¹ the Federal Court of Canada excused the applicant's delay to flee her country of origin because she was in hiding prior to her departure. In *Farahmandpour v. Canada (Minister of Citizenship and Immigration)*,²⁸² the Federal Court found that the applicant's delay was caused by her poor health. In *Cazak v. Canada (Minister of Citizenship and Immigration)*,²⁸³ the Federal Court of Canada found the applicant's delay to flee her country was justified on the basis of psychology and dependence of those who are subject to domestic violence, although she did not leave her country immediately after being beaten by her husband and receiving threats against her family.

In reality, unaccompanied minors "may not know the specific circumstances that led to their flight from the country of origin and, even if they know the circumstances, they may not know the details of those circumstances".²⁸⁴ For this reason, evidence of delayed flight from country of origin should not lead to inference of lack of subjective fear in the case of unaccompanied minors seeking asylum in Canada.

In fact, even if the subjective fear has to be examined for an unaccompanied minor seeking asylum, inferences should not be drawn from any pre-application conduct to conclude lack of subjective fear. For instance, in *Nahimana v. Canada (Minister of*

²⁸¹ *Mejia v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1026, IMM 1040-95 (T.D.)

²⁸² *Farahmandpour v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1839, IMM 92-97 (T.D.)

²⁸³ *Cazak v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 390, [2002] F.C.J. No. 505

²⁸⁴ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12

Citizenship and Immigration),²⁸⁵ the IRB had rejected the claims of an unaccompanied minor, Nahimana, and her minor daughter. However, the Federal Court of Canada stated that “Ms Nahimana deserves a fair hearing, which included the understanding of her subjective elements of evidence without any unreasonable inferences”.²⁸⁶ Furthermore, the Court explained that the merits of the claimants’ review should be analyzed solely on their own allegation and that any references about family members and acquaintances who may have assisted the principle claimant, Nahimana, to flee could only be understood considering the age of the claimant being 12 years old when the said events took place.²⁸⁷ Here, being a minor, Nahimana did not exactly know the specific circumstances of why her father’s friend told her it would be dangerous for her to go to her mother’s house and decided for her that she should leave her country of origin to Kenya. In this case, Nahimana was a 14 years old minor when she entered Canada and made a refugee claim with her minor daughter, born in the United States, after Nahimana fled from her country of origin at 12 years old, through Kenya, where she stayed for sometime and was abused sexually by a friend of her father’s friend and others.²⁸⁸ Eventually, she was sent to the United States, with a false passport. She stayed in the United States and worked as a baby sitter. When she became pregnant there and gave birth to her daughter, she was told by her employer to seek refugee protection in Canada.²⁸⁹ Nahimana did not know why her employer advised her to seek refugee protection in Canada. This case clearly shows that the minor’s decisions to flee from her country of origin as well as to seek refugee protection in Canada were made by other people rather than the child refugee claimant herself. Therefore, inference of lack of subjective fear should not be drawn from any pre-application conduct of unaccompanied minors.

A fourth mechanism by which courts can infer lack of subjective fear is from the evidence of refugee claimant’s engagement in preflight conduct which increased his risk

²⁸⁵*Nahimana v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 161

²⁸⁶*Ibid.* at para. 35

²⁸⁷*Ibid.*

²⁸⁸*Ibid.* at para. 8-10

²⁸⁹*Ibid.*

of persecution.²⁹⁰ For instance, if a refugee claimant had engaged in continued political activity even after incidents of persecution from police or other representatives of his State, then an inference can be drawn that he lacks subjective fear because a truly fearful person would have discontinued his political involvement after the first incidents of police persecution.²⁹¹ However, continuing a social or political cause should not be taken to indicate a claimant's lack of subjective fear because denying refugee protection on this misconception cannot be reconciled with the basic goals of refugee law. Any struggle for political ideals should not be regarded as a fault but rather as a right.²⁹² In addition, the aim of the Refugee Convention is to protect persons who would be subjected to political persecution through no fault of their own.²⁹³ Political activism is not in itself a 'fault'.

The decision of the Federal Court of Canada in *Gebremichael*²⁹⁴ illustrates why inference of lack of subjective fear should not be drawn from minors' engagement in preflight conduct which increased their risk of persecution. This case dealt with an application for judicial review of a decision of the Refugee Protection Division of the IRB, wherein it was determined that two applicants, a brother and a sister, were not Convention Refugees or persons in need of protection. Addis Gebremichael (principal applicant) and his sister, Hiwote Gebremichael (minor applicant) claimed well-founded fear of persecution in Ethiopia based on political opinion, resulting from membership in the All Ethiopia Unity Party, and based upon their Amhara ethnicity. The applicants' parents made arrangements for Hiwote and Addis to flee Ethiopia because on April 17, 2004, Kebele officials allegedly went to the principal applicant's house looking for him but, when they could not find him; they raped his sister, Hiwote, who was subsequently hospitalized for three days. The IRB noted that Hiwote continued to attend school until June 2004, even after the alleged rape.²⁹⁵ Although Hiwote explained that she continued

²⁹⁰ Hathaway & Hicks, *supra* note 31 at 528-529

²⁹¹ *Ibid.* at 529

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Gebremichael*, *supra* note 237

²⁹⁵ *Ibid.* at para. 10

attending school because the authorities were searching for her brother, the IRB found this explanation unreasonable, holding that a person truly abused would be fearful for her safety and would try to protect herself from any such future encounters.²⁹⁶ Moreover, it was open to the IRB to determine that if a person is truly abused or mistreated, she would have made efforts to protect herself from future abuse.²⁹⁷ For this reason, the IRB drew an adverse inference with respect to Hiwote's subjective fear²⁹⁸ because, presumably, Hiwote's preflight conduct would increase her risk of persecution (i.e. she continued to attend school and did not take efforts to protect herself from future abuse).

However, in *Gebremichael*,²⁹⁹ the Federal Court of Canada ruled that the IRB, with undue hindsight, considered Hiwote's action to return to school and failed to consider her post-traumatic stress disorder or cultural factors that could have affected her decision to continue to go to school. Furthermore, the Court indicated that the IRB failed to see Hiwote's evidence from the perspective of someone of her age and with her cultural background. The Court stated that the IRB assessed the reasonableness of Hiwote's explanation from the IRB's perspective rather than from her perspective. As for Hiwote's decision to continue to attend school even after being raped, the Court explained that it was not implausible for Hiwote to have honestly believed or hoped that she would not be sexually assaulted in the future, and that she would be safe because the authorities were interested in her brother and not her.³⁰⁰

Subjecting unaccompanied minors to inference of lack of subjective fear from their preflight conduct, which would have increased their risk of persecution, may be illogical because minors may not understand the consequences of their own actions and usually the moment they flee from persecution is determined by their parents. For instance, in *Gebremichael*,³⁰¹ the parents of Hiwote and Addis decided in April 2004

²⁹⁶ *Ibid.*

²⁹⁷ *Alizadeh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 11 (C.A.)

²⁹⁸ *Gebremichael*, *supra* note 237 at para. 46

²⁹⁹ *Ibid.* at para. 48

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.* at para. 10

that she and her brother should flee Ethiopia, after Hiwote was raped by officials. Although Hiwote and Addis had valid visas to go to the United States, they waited fleeing Ethiopia and their parents made arrangements for them to flee Ethiopia by obtaining visitors' visa for them in July 2004 to come to Canada because they had heard that asylum claims in the United States were being denied.³⁰² Here, the parents' concern for their children should not be inferred as absence of children's subjective fear.

In the case of *Lorne*,³⁰³ Lorne claimed that her father inappropriately touched her from the age of six and sexually molested her on a weekly basis from the age of 12 until she left Jamaica when she was 18 years old. It was unreasonable for the IRB to expect a scared child of twelve who is being raped twice weekly to do more than reporting the matter to her teacher, who did not help her by reporting the matter to the police. Furthermore, the IRB also failed to address the testimonial evidence of a social worker of Jamaican origin regarding the normalizing of incest by abused children that would fully explain the claimant's conduct.³⁰⁴ The Federal Court of Canada found that failure to address these points was pivotal to finding of lack of subjective fear.³⁰⁵ Moreover, the Court found that the IRB gave no rationale for its assumption that a child was supposed to do more than telling her teacher about her father's abuse.³⁰⁶ Therefore, in such circumstances, it would be irrational to infer lack of subjective fear from a minor's preflight conduct (that is not doing more than telling her teacher), which may have increased her risk of persecution.

In *Anwar v. Canada (Minister of Citizenship and Immigration)*,³⁰⁷ the applicant, Anwar, nineteen years old when she arrived in Canada to make a refugee claim, said that she continued her daily life after being released from detention on four separate occasions in her home country. She went into hiding only after she was released from a fifth detention. Here, since the preflight conduct of the claimant increased her risk of

³⁰² *Ibid.* at paras. 3 and 8

³⁰³ *Lorne*, *supra* note 257

³⁰⁴ *Ibid.* at para. 16

³⁰⁵ *Ibid.* at para. 20

³⁰⁶ *Ibid.* at para. 17

³⁰⁷ *Anwar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1077, [2002] F.C.J. No. 1434

persecution, the IRB, presumably, did not find her conduct to be plausible during the period of the first four arrests. Although the IRB concluded her version of events to be implausible because she continued going to school after each of the first four arrests, rather than remaining at home, the Federal Court found that the IRB considered the plausibility of her conduct with undue hindsight.³⁰⁸ This is because the applicant was acting on a belief that she did nothing wrong and that she need not have to change the way in which she led her life.³⁰⁹ Moreover, the Court reasoned that it was not implausible for Anwar to believe that the worst for her may have been over during that period.³¹⁰

A fifth mechanism by which courts can infer lack of subjective fear from pre-application conduct is when an applicant returns to his country of origin, that is re-availing himself to persecution. Such a conduct is treated as evidence for lack of fear of persecution. Although unaccompanied minors are to be given designated representatives to assist them in instructing counsel, to make other decisions concerning the proceedings or to help them to make those decisions and to act in their best interests,³¹¹ if unaccompanied minors were to make unwise decisions to return to their country of origin to see their parents and other siblings whom they missed so much, such decision should not be taken to indicate lack of fear. This is because unaccompanied minors may lack the maturity to appreciate the nature and consequences of their actions.

Even truly fearful adults applicants, as Hathaway argued, may be compelled by the necessity of tending to sick or dying, or by financial necessity to travel to their country of origin.³¹² Therefore, he argued that there may be wide variety of personal emergencies that could lead the fearful applicants to risk persecution by traveling to their country of origin.³¹³ As such, unaccompanied minors are much more vulnerable than adult refugee claimants. Their decision to return to their homeland, for whatever

³⁰⁸ *Ibid.* at para. 49

³⁰⁹ *Ibid.* at para. 50

³¹⁰ *Ibid.* at para. 52

³¹¹ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12

³¹² Hathaway & Hicks, *supra* note 31 at 529

³¹³ *Ibid.* at 530

reasons and personal emergencies, should not be taken as inference of lack of subjective fear.

In fact, Article 1(C)(4) of the Refugee Convention³¹⁴ provides for cessation of refugee status not as a result of return to applicant's country of origin but upon his re-establishment there. Therefore, an unaccompanied minor's temporary return to his or her country of origin should not lead to inference of lack of fear by the courts.

Lastly, it is important to note that Waldman points to the disagreement in the jurisprudence as to whether a finding that a person has a subjective fear is a separate requirement or whether it is part of the credibility assessment.³¹⁵ He notes that a finding of lack of subjective fear of a person is often found as equivalent to lack of credibility of a person, citing the view of Hugessen J.A. in *Yusuf v. Canada (Minister of Employment & Immigration)*.³¹⁶ For instance, the Refugee Division of the IRB had dismissed a refugee claim holding that, although there was objectively danger of persecution given the existing state of civil rights in Somalia, the refugee claimant's testimony as to her subjective fear was not credible.³¹⁷

Likewise, Professor Hathaway also noted the growing practice of equating lack of credibility with absence of subjective fear, leading to denial of refugee protection.³¹⁸ He added that under this approach, a claimant deemed to be credible is assumed to be fearful. For instance, in *Ward v. Attorney General*, Justice La Forest of the Supreme Court of Canada noted that "[t]he Board here found Ward to be credible in his testimony, thus establishing the subjective branch [i.e. subjective fear]."³¹⁹ In *Maximilok v. Canada (Minister of Citizenship and Immigration)*, Justice Joyal of the Federal Court of Canada indicated that "[t]he subjective basis for the fear of persecution rests solely on the credibility of the applicants."³²⁰ Citing this principle, the Federal Court of Canada, in

³¹⁴ Refugee Convention, *supra* note 30, art. 1(C)(4)

³¹⁵ Waldman, *Canadian Immigration & Refugee Law Practice*, *supra* note 34 at 285

³¹⁶ See *Yusuf*, *supra* note 202 at 631-632

³¹⁷ See *ibid.*

³¹⁸ Hathaway & Hicks, *supra* note 31 at 531

³¹⁹ *Ward*, *supra* note 31 at para. 54

³²⁰ *Maximilok v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1163 at para. 17 (T.D.) [*Maximilok*]

Ayala v. Canada (Minister of Citizenship and Immigration),³²¹ ruled that the IRB properly assessed the subjective basis of the applicants' refugee claim by determining that the applicants lacked credibility.

Professor Hathaway noted that the subjective fear inquiry is so difficult and fraught with uncertainty that erroneous determinations are virtually assured especially when an effort is made to assess subjective fear based on applicant's outward demeanor and the content of his or her testimony.³²² Importantly, lack of credibility is assessed from a refugee claimant's demeanor, plausibility and consistency in his testimony.³²³ Assessing credibility using demeanor presupposes that decision-makers know what truth telling looks like and that it looks the same on everybody. Since culture, gender, class, education, trauma, nervousness and simple variation among humans, including differences between adults and children, can affect how people express themselves, it could be misleading to rely on a uniform set of cues to examine a claimant's demeanor in order to determine his credibility.³²⁴ Therefore, messages conveyed by demeanor are indeterminate and contingent. Plausibility and consistency are also assumed to be equivalent to the truth but they are not.³²⁵

Therefore, a finding of lack of subjective fear of a person is equivalent to lack of credibility of a person, especially when effort is made to assess subjective fear based on a refugee claimant's outward demeanor and content of his testimony.

In *Uthayakumar v. Canada (Minister of Citizenship and Immigration)*,³²⁶ the Convention Refugee Determination Division concluded that the two unaccompanied minors were not Convention Refugees, by failing to attach any credibility to the

³²¹ *Ayala*, *supra* note 87 at paras. 1 and 34

³²² Hathaway & Hicks, *supra* note 31 at 517

³²³ Audrey Macklin, "Truth and Consequences: Credibility Determinations in the Refugee Context" (International Association of Refugee Law Judges: Ottawa, Canada, 14-16 October 1998) at 137-138, online: The Refugee Law Reader <http://www.refugeelawreader.org/298/Truth_or_Consequences_Credibility_Determinations_in_the_Refugee_Context.pdf>

³²⁴ *Ibid.* at 138

³²⁵ *Ibid.* (Plausibility refers to the relationship between what the refugee claimant describes and what the decision-makers think they 'know' about how the external world works. Consistency examines the relationship between the different statements made by the refugee claimant and looks for contradiction.)

³²⁶ *Uthayakumar v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1013 (T.D.) at paras. 11 and 25 [*Uthayakumar*]

applicants' testimony. The panel also concluded that the applicants did not establish a well-founded fear of persecution.³²⁷ The Federal Court of Canada ruled that the panel had committed an error in doing so because although the minors' testimony raises many questions, none of their contradictions appears important so as not to attach any credibility to them.³²⁸ The Court also found that the panel did not assess the minors' fear with respect to their arrest by the police in Sri Lanka, prior to their arrival in Canada.³²⁹ The Court addressed the issue that the panel has to consider the age of the unaccompanied minors who were 10 years old and 12 years old in this case.³³⁰ Therefore, lack of credibility assessment has to consider the age of unaccompanied minors that they might be under great stress as a result of their journey from their country of origin to a new asylum country without their parents and that they might not remember all of the events clearly so as to give a credible testimony of their pre-application conduct.³³¹

In *Uthayakumar*,³³² the IRB found the unaccompanied minors' claim not credible. Arguably, the IRB could have made an inference of lack of subjective fear as part of the credibility assessment of the claimants so as to render a decision that the minors did not establish a well-founded fear of persecution.

Although an applicant's credibility and the plausibility of testimony should be assessed in the context of his or her country's conditions and other documentary evidence available to the IRB,³³³ the IRB may draw inferences from evidence.³³⁴ The IRB is also entitled to conclude that an applicant is not credible because of

³²⁷ *Ibid.* at para. 12

³²⁸ *Ibid.* at para. 24

³²⁹ *Ibid.* at para. 27

³³⁰ *Ibid.* at para. 28

³³¹ See *ibid.*

³³² *Ibid.* at paras. 11 and 25

³³³ *Gebremichael*, *supra* note 237 at para. 37; See *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); See *Frimpong v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 441 (C.A.) [*Frimpong*]

³³⁴ *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Frimpong*, *ibid.*

implausibility in his or her evidence as long its inferences are not unreasonable.³³⁵ Moreover, the IRB is entitled to make reasonable findings based on implausibility, common sense and rationality.³³⁶

With respect to the assessment of the credibility of testimony, the Federal Court of Appeal held in *Aguebor v. Canada (Minister of Employment and Immigration)*³³⁷ that the Refugee Division has complete jurisdiction to gauge the credibility of an account and to draw the necessary inferences, which are not open to judicial review if they are not so unreasonable.

Importantly, the Federal Court has found that the IRB has well-established expertise to determine questions of fact, particularly “in the evaluation of the credibility and the subjective fear of persecution of an applicant”.³³⁸ The courts accord a high degree of deference to credibility findings of the IRB and therefore, applicants seeking to set aside credibility findings have a very high onus to discharge at the stage of seeking leave and at the hearing if leave is granted.³³⁹ Moreover, the UNHCR Handbook urges that the benefit of the doubt be accorded to refugee claimants only after when an examiner is satisfied as to the claimant’s general credibility.³⁴⁰

As credibility tests become tests of intention of refugee claimants, the challenge to credibility is that a refugee claimant is not really afraid, in other words, he or she lacks subjective fear.³⁴¹ Moreover, credibility determination is not about discovering the truth but rather about making choices of what to accept, what to reject and how much to believe the refugee claimants’ story, their fear and “where to draw the line- in the face

³³⁵ *Gebremichael*, *supra* note 237 at para. 37; See *Hilo v. Canada (Minister of Citizenship and Immigration)* (1991), 130 N.R. 236 (F.C.A.)

³³⁶ *Gebremichael*, *ibid.*; See *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (C.A.) at para. 2

³³⁷ *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732, 160 N.R. 315 (C.A.) at para. 4 [*Aguebor*]

³³⁸ *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1800 (T.D.) at para. 38; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (T.D.) at para. 14

³³⁹ *Mateus v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1193; See *Aguebor*, *supra* note 337

³⁴⁰ UNHCR, *Handbook*, *supra* note 41 at paras. 196 and 204

³⁴¹ David Matas, “Credibility of Refugee Claimants” (1994) 21 Imm. L.R. (2d) 134 at n. 1

of empirical uncertainty”.³⁴² In fact, the credibility of a refugee claimant is central to whatever view or opinion the members of the IRB may have or eventually express through their decisions.³⁴³

Therefore, arguably, given that a finding of lack of subjective fear is equivalent to lack of credibility assessment, eliminating the subjective fear requirement from the criteria of well-founded fear for unaccompanied minors would take into account the age, vulnerability and the special needs of children.³⁴⁴

To sum up, decision-makers at refugee determination hearings should not infer lack of subjective fear from unaccompanied minors’ pre-application conduct, through mechanisms that are not logically connected to the existence of fear.

2.6 Advantages of Using a Single Objective Element for Well-Founded Fear in the case of Unaccompanied Minors

There are advantages to use a single objective element to assess the well-founded fear of persecution in the refugee determination hearings of unaccompanied minors. Here, a single objective element suggested refers to requiring unaccompanied minors to establish their objective fear only, without requiring them to establish their subjective fear. To put it differently, unaccompanied minors need only to satisfy the objective component of the well-founded fear that requires a refugee’s fear to be evaluated objectively to determine if there is a valid basis for that fear, without having to establish the subjective component that relates to the existence of the fear of

³⁴² Macklin, *supra* note 323 at 140

³⁴³ Olugbenga Shoyele, “Apprehension of Bias and Refugee Claims under the Canadian Legal system” (2003) 16 Can. J. Admin. L. & Prac. 67 at 80

³⁴⁴ Briefly, credibility assessment is not the same as finding subjective fear. However, in practice, this leads to confusion. For instance, when a minor is found not to be credible, he could also be determined not to have subjective fear, through inference. As a result, he will be unsuccessful in his refugee determination hearing. Taking into account age, vulnerability and special needs of unaccompanied minors, eliminating the requirement of subjective fear for them would not lead to this confusion. This does not mean that credibility assessment has to be eliminated for unaccompanied minors. Rather, when assessing credibility of unaccompanied minors, benefit of doubt should be given to their story, allowing minor contradictions in their story.

persecution in their minds.³⁴⁵ There are benefits to using a single objective element for unaccompanied minors.

To begin with, unaccompanied minors need not be forced to testify to their fears. Analyzing the objective fear of children would allow decision-makers to focus on the objective risk evidence, thereby, eliminating the time required to make children testify or interviewing them.³⁴⁶ This would also reduce the stress placed on children during their refugee status determination. For instance, a very significant number of refugee claimants' accounts include instances of torture, rape, arbitrary detentions, threats, and armed attacks. Such events can engender post-traumatic psychological reactions in child claimants and could affect their ability to testify and the content of their testimony.³⁴⁷ Moreover, trauma can alter the account of an experience related by children in ways such as memory blocks could compromise the coherence of trauma stories, difficulty in concentrating could be responsible for numerous little mistakes that can be easily interpreted as lack of credibility³⁴⁸ by decision-makers, and trauma could alter perception of time and could distort reports of the time sequence.³⁴⁹ These factors could affect the credibility of minors whose trauma stories may be very difficult to be interpreted by non-specialists, whereas psychological or psychiatric experts may disentangle the effects of trauma from credibility issues.³⁵⁰ Therefore, preventing

³⁴⁵ *Contra Ward*, *supra* note 31 (“[W]hat exactly must a claimant do to establish fear of persecution?...the test is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense...The subjective component relates to the existences of the fear of persecution in the mind of the refugee. The objective component requires that the refugee’s fear be evaluated objectively to determine if there is a valid basis for that fear” at para. 47)

³⁴⁶ Carr, *supra* note 200 at 571; Nevertheless, interview may be necessary for minors fleeing from relatives and abuse, especially when there are no human rights records available on the claimant’s country conditions. In such a case, minors can be interviewed by psychiatric and psychological experts. Children’s testimony can be replaced with experts’ reports.

³⁴⁷ Cr peau, Houle & Foxen, *supra* note 218 at 48

³⁴⁸ If the Refugee Division determines that a refugee claimant is lacking in credibility, then it can legitimately find that there is no subjective basis for the refugee claim: See Waldman, *The Definition of Convention Refugee*, *supra* note 86 at para. 8.15

³⁴⁹ See Cr peau, Houle & Foxen, *supra* note 218 at 48 and 49

³⁵⁰ See *ibid.* at 49; See Save the Children & UNHCR, “Statement of Good Practice”, 3rd ed., (2004), online: Separated Children in Europe Programme <http://www.separated-children-europe-programme.org/separated_children/good_practice/index.html> at 25 (It is desirable for an independent expert to carry out an assessment of the child’s ability to articulate a well-founded fear of persecution and

unaccompanied minors from testifying to their fears could prevent a negative refugee determination decision, resulting from lack of credibility due to the subtle influence of traumatic experience on children's testimony. In fact, children's testimony can be replaced with reports from psychiatric or psychological experts who could differentiate effects of trauma and lack of credibility.

Importantly, the position that the appropriate test for ascertaining the genuineness of an unaccompanied minor's refugee claim ought to be objective assumes that consistent and credible testimony of a claimant is not subjective but objective evidence.³⁵¹ Canadian jurisprudence supports this understanding of objective testimony.³⁵² Therefore, when children's testimony is required,³⁵³ in the absence of documentary evidence or other evidence that can be usually obtained from human rights data on the country of origin, the consistent and credible testimonial evidence of unaccompanied minors could constitute the objective foundation of their claim. Testimonial evidence adduced by unaccompanied minors must be considered, along with all other probative evidence, in an analysis of forward looking risk of being persecuted (i.e. objective fear).³⁵⁴ This is because all evidence probative of a claimant's risk of being persecuted must be admitted for the assessment of actual risk (i.e. objective fear) and must be accorded the weight it should merit. Evidence should not be classified as subjective evidence (testimonial evidence) and objective evidence (externally

also identify any difficulties a child may have in recounting painful incidents or disclosing sensitive information).

³⁵¹ See Hathaway & Hicks, *supra* note 31

³⁵² Hathaway, *The Law of Refugee Status*, *supra* note 129 at 84; See *Ranjit Thind Singh v. Minister of Employment and Immigration*, Federal Court of Appeal Decision A-538-83, 27 November 1983, Heald J. (For the circumstances at which testimony to be adjudged plausible, credible and frank, and hence sufficient to establish the objective foundation of a claim to refugee status, see the primary rule that has been stated by the Federal Court of Appeal in this case: "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.")

³⁵³ Where interviews are required, they should be carried out in a child-friendly manner (for example with breaks and in a non-threatening atmosphere) by officers trained in interviewing children. Children should always be accompanied at each interview by their counsel, designated representative and where the child so desires, by other significant adults, such as worker, relative, guardian etc. Unaccompanied minors should be able to provide testimony through a number of different means. These could include oral testimony, drawings, writings, video recorded interviews with independent experts and testimony via video-link: See Save the Children & UNHCR, "Statement of Good Practice", *supra* note 350 at 25

³⁵⁴ See Hathaway & Hicks, *supra* note 31 at 546 and 547

generated evidence) because this would lead to an assumption that without subjective fear, refugee status would be denied to unaccompanied minors, who would face a greater risk than that revealed by the so-called objective (externally generated) evidence alone.³⁵⁵

Interestingly, utilising objective fear exclusively to assess the well-founded fear of unaccompanied minors would prevent the tendency of decision-makers to rely overly on past experiences of children to establish their genuine fear of persecution. The notion of “well-founded” indicates an objective inquiry into the actual risk that confronts refugee claimants.³⁵⁶ A single objective assessment of risk would mean that unaccompanied minors could be granted a Convention refugee status without providing evidence of past persecution but that they might face persecution if returned to their country of origin.³⁵⁷ Although past persecution may be a good indicator as to why a person fears persecution, it is not required to demonstrate the need for refugee protection.³⁵⁸

Next, inherent difficulties in child refugee applications can be eliminated by focusing on objective fear exclusively to determine well-founded fear. For instance, unaccompanied minors may be unable to express fear and reluctant to disclose their fear to authorities.³⁵⁹ Focusing on objective fear exclusively to assess well-founded fear would ensure that unaccompanied minors will not be denied of refugee protection due to their inability to conceive fear or to communicate their personal fear.

Assessing well-founded fear with a single objective element (i.e. objective fear) is further supported by a linguistic analysis of the term ‘fear’ which refers to forward-looking expectation of risk that does not necessarily indicate subjective fear that is exhibited by trembling.³⁶⁰ Therefore, the best way to ascertain the possibility of future

³⁵⁵ See *ibid.*

³⁵⁶ Hathaway, *The Law of Refugee Status*, *supra* note 129 at 65

³⁵⁷ See Adjin-Tettey, “Reconsidering”, *supra* note 62 at 134

³⁵⁸ *Ponniah*, *supra* note 88 at 34

³⁵⁹ Carr, *supra* note 200 at 572

³⁶⁰ *Ponniah*, *supra* note 88 at 66-67; Hathaway & Hicks, *supra* note 31 at 545; Adjin-Tettey, “Reconsidering”, *supra* note 62 at 134

risk would be to assess the objective conditions in the home country that would give rise to the fear of persecution.

Furthermore, the approach of using objective fear exclusively would facilitate reliance on general human rights data for unaccompanied minors and would reduce the burden on minors to adduce evidence pointing to their subjective fear of persecution. Information concerning minors' situation such as testimony of witnesses, expert evidence, documentary evidence concerning similarly situated children and general conditions about the children's country of origin, could be prepared for the IRB. The IRB could determine the refugee claims of unaccompanied minors, allowing liberal application of the benefit of the doubt and considering the circumstances of parents and other family members in the claimant's country of origin.³⁶¹

Consequently, eliminating subjective fear to assess well-founded fear would mean that decision-makers need not rely on mechanisms to infer lack of subjective fear or to create innovative ways to circumvent the subjective apprehension element. This could also reduce the number of appeals at the Federal Court of Canada because applications would not be rejected anymore due to lack of subjective fear where objective risk evidence exists.³⁶²

Moreover, given that a finding of lack of subjective fear of a person is equivalent to lack of credibility of a person,³⁶³ eliminating the subjective fear requirement from the traditional criteria of well-founded fear for unaccompanied minors would take into account the age, vulnerability and the special needs of children. Interestingly, in the United Kingdom, asylum claims of unaccompanied children are rejected regularly, in practice, based on credibility issues without a significant assessment of objective criteria.³⁶⁴ This can be avoided in asylum claims of unaccompanied minors in Canada by using objective criteria exclusively to assess children's well-founded fear, eliminating the need to infer the absence of their subjective fear.

³⁶¹ UNHCR, *Handbook*, *supra* note 41 at paras. 213-219

³⁶² Carr, *supra* note 200 at 572

³⁶³ See the view of Hugessen J.A in *Yusuf*, *supra* note 202 at 631-632; See *Ward*, *supra* note 31 ("The Board here found Ward to be credible in his testimony, thus establishing the subjective branch [i.e. subjective fear]" at para. 54)

³⁶⁴ Russell, *supra* note 169 at 51

2.7 Broader Single Objective Test for Unaccompanied Minors

In this part, a broadened single objective test will be proposed to ascertain well-founded fear of persecution for unaccompanied minors seeking asylum in Canada. The single objective test, proposed for unaccompanied minors, will not render the particular circumstances of a refugee claimant irrelevant. Indeed, the single objective test would ensure that individual and special circumstances of unaccompanied minors are considered.

The proposed single objective test to ascertain well-founded fear of unaccompanied minors takes the position of Atle Grahl-Madsen that ‘well-founded’ “suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a more objective yardstick.”³⁶⁵ Grahl-Madsen pointed to the problem of determining whether fear actually exists in a person’s psyche, by stating that “[w]e cannot find a meaningful, common denominator in the minds of refugees. We must seek it in the conditions prevailing in the country whence they have fled.”³⁶⁶ He said that well-founded fear of being persecuted will be said to exist if it is likely that the person concerned will become the victim of persecution if he returns to his country of origin.³⁶⁷

Likewise, Hathaway argued that whether fear actually exists in a refugee claimant’s mind is irrelevant because “[i]t is clear from an examination of the drafting history of the [Refugee] Convention that the term ‘fear’ was employed to mandate a forward-looking assessment of risk, not to require an examination of the emotional reaction of the claimant.”³⁶⁸

Accordingly, the single objective test proposed for unaccompanied minors suggests that refugee protection would be extended to a minor once the objective risk of persecution has been established, taking into account how these conditions would affect

³⁶⁵ Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1 (Leyden: A.W. Sijthoff, 1966) at 173

³⁶⁶ *Ibid.* at 175

³⁶⁷ *Ibid.*

³⁶⁸ Hathaway, *The Law of Refugee Status*, *supra* note 129 at 66

a particular unaccompanied minor seeking asylum. To satisfy the Convention refugee definition, the mere fact that human rights violations are prevalent in an asylum-seeker's home country is not sufficient evidence to justify a positive refugee determination decision.³⁶⁹ An individual's particular circumstances must be placed in the context of those human rights violations to show that he or she would be at risk if returned there.³⁷⁰ For this reason, a single objective test recommended for unaccompanied minors will consider the particular circumstances of children in the context of such violations.³⁷¹

There has been a traditional tendency to refuse refugee protection to persons if their claims are found solely on the generalized conditions in the country of origin because of the individualized focus of refugee protection.³⁷² Thus, the traditional practice is that a refugee claim will be determined not to be well-founded if a refugee claimant has not been specifically targeted or singled out for the harm feared.³⁷³ However, unaccompanied minors would stand to lose most from this traditional practice as they are more likely to flee harms arising from generalized conditions.

For instance, over half of the world's refugees are children³⁷⁴ and these refugees will be fleeing from one of the continuing conflicts and human rights abuses in areas like Somalia, Afghanistan, Rwanda, Sierra Leone or the former Yugoslavia.³⁷⁵ Children

³⁶⁹ Michael Bossin & Laila Demirdache, "A Canadian Perspective on the Subjective Component of the Bipartite Test for "Persecution": Time for Re-evaluation" *Refuge* 22:1 (May 2004) 108 at 111

³⁷⁰ *Ibid.*

³⁷¹ For instance, to ascertain objective fear and to gather evidence personal to minor claimants, the following can be used: See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 ("[A]ll interviews with unaccompanied children, including interview for the determination of refugee status, should be carried out by professionally qualified and specially trained persons with appropriate knowledge of the psychological, emotional and physical development and behavior of children. When possible, such experts should have the same cultural and mother tongue as the child", at para. 5.12. "It is important to take into account the circumstances of the family members as this may be central to a child's refugee claim", at para. 8.8. If there is reason to believe that the parents of unaccompanied minors wish their child to be outside the country of origin on grounds of their own well-founded fear of persecution, the child himself or herself may be presumed to have such a fear, at para. 8.9).

³⁷² Adjin-Tettey, "Reconsidering", *supra* note 62 at 147

³⁷³ *Ibid.*

³⁷⁴ Russell, *supra* note 169 at 5

³⁷⁵ Alison Hunter, "Between the Domestic and the International: The Role of the European Union in Providing Protection for Unaccompanied Refugee Children in the United Kingdom" (2001) 3 *Eur. J. Migr. & L.* 383

also flee from their home for other reasons such as abuse, abandonment, poverty, lack of opportunity, and child trafficking for the purpose of sexual exploitation.³⁷⁶ As noted by Human Rights Watch, Tamil Tigers, in Sri Lanka, had been for a long time abducting thousands of boys and girls for use in its forces.³⁷⁷ In fact, Human Rights Watch has urged the United Nations Security Council, on 27 November 2006, to impose sanctions against the Tamil Tigers and armed groups in other countries that are long known to recruit and use child soldiers. Human Rights Watch has compelling evidence that the Sri Lankan government forces are helping the Karuna group, an armed faction that split from the Liberation Tigers of Tamil Eelam (LTTE), to abduct boys. Indeed, confirming this, Ambassador Allan Rock, a United Nations advisor on children and armed conflict, found strong and credible evidence that certain elements of the Sri Lankan government security forces are supporting and sometimes participating in the abduction and forced recruitment of children.³⁷⁸

Under these circumstances, unaccompanied minors should not be required to show that they have been singled out for persecution for their refugee claim to be considered well-founded. Rather, an unaccompanied child seeking asylum should only be required to demonstrate that there is a genuine risk of either generalized or personalized persecution in his or her home country.³⁷⁹ Such an interpretation of the well-founded fear would focus exclusively on the objective fear for unaccompanied minors, conceptualizing a broader single objective test.

³⁷⁶ *Ibid.*

³⁷⁷ Human Rights Watch (HRW), Human Rights News, “Sri Lanka: Stop Child Abductions by Karuna Group” (28 November 2006), online: HRW <<http://hrw.org/english/docs/2006/11/28/slanka14678.htm>>, cited in Immigration and Refugee Board of Canada (IRB), National Documentation Packages: Sri Lanka, 19 January 2007), online: IRB <http://www.irb-cisr.gc.ca/en/research/ndp/index_e.htm?id=383>

³⁷⁸ *Ibid.*

³⁷⁹ For evidence requirements, generalized persecution can be demonstrated by human rights abuses in the claimant’s country of origin. See Waldman, *The Definition of Convention Refugee*, *supra* note 86 at para. 8.61.1 (If the claimant’s country has a record of human rights violations, evidence of this will help to establish the objective basis of the refugee claim. If the claimant’s country origin has a moderate or creditable human rights record, it will be necessary for the claimant and his or her counsel to present documentary or other evidence to demonstrate that, despite the general situation in his or her country of origin, the claimant has reason to believe that he or she will be at risk there). This would help to demonstrate personalized persecution. See Hathaway, *The Law of Refugee Status*, *supra* note 129 (“the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded [to] similarly situated persons in the country of origin” at 97). In fact, such evidence would arguably prove personalized persecution.

A child refugee claimant's fear of persecution need not be identifiable to him or her only on the basis of an individualized set of facts. Unaccompanied children's fear of persecution could arise from a general situation of oppression, violence and human right abuses committed against children generally in certain countries.³⁸⁰

In Canada, a refugee claimant's plausible, credible and consistent testimony, in the absence of evidence to the contrary, is sufficient to demonstrate the whole of the evidence of objective risk necessary to support a well-founded fear of persecution.³⁸¹ If the credibility of a refugee claimant is not questioned, the truthfulness of the claimant's testimony will not be doubted even in the absence of documentary evidence of, for example, forced recruitment of young females in Sri Lanka.³⁸² Moreover, in the absence of inherent contradictions in a refugee claimant's evidence, or a direct conflict with documentary evidence, a refugee claimant's evidence that is not contradicted will be

³⁸⁰Like the case of forced recruitment of child soldiers in Sri Lanka, certain human right violations against children can be generalized conditions in certain countries. See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 (Policies and practices "constituting gross violations of specific [human] rights of the child [under the *Convention on the Rights of the Child*] may, under certain circumstances, lead to situations that fall within the Scope of the refugee Convention" at para. 8.7).

On the other hand, ascertaining fear of unaccompanied minors from general situation of oppression could raise a concern of creating an incentive for parents to abandon their children. However, refugee protection should be extended to unaccompanied minors once they established their well-founded fear of persecution, even if their parents had voluntarily abandoned them.

See also Sandy Ruxton, "Report: Separated Children and EU Asylum and Immigration Policy" (Save the Children, 2003), online: Separated Children in Europe Programme < http://www.separated-children-europe-programme.org/separated_children/publications/reports/index.html#eu_asylum > (Moreover, it should be remembered that "the reasons for children's separation from their country of origin and family are wide-ranging and complex. Many children flee for refugee reasons, having a well-founded fear of persecution. Other children are displaced by war, or escape from abusive environments or extreme poverty. In many cases the reasons are interlinked" at 13); See Save the Children & UNHCR, "Statement of Good Practice", *supra* note 350 (It is recognized that "[s]ome separated children travel on their own as migrants seeking relief from situations of poverty, deprivation and hardship". Nevertheless, it is recommended that "[t]hey should be entitled to make an asylum application and/or an application for residence" at 14).

³⁸¹ Adjin-Tettey, "Reconsidering", *supra* note 62 at 138; See Carolyn Blum, "Who is a Refugee? Canadian Interpretation of the Refugee Definition" (1986) 1 Imm. J. 8 at 9 (In Canada, as long as the refugee claimant's testimony is plausible, credible and frank, it may constitute to the whole of the evidence of objective risk necessary to support an affirmative finding of refugee status); See also Julius H. Grey, *Immigration Law in Canada* (Scarborough: Butterworths, 1984) at 117 (Credible, plausible and frank testimony of a claimant constitutes to the whole of the evidence of objective risk necessary to support a positive determination of refugee status, even if the testimony consists largely of hearsay evidence.)

³⁸² See *Sathanandan v. Canada (M.E.I.)* (1991), 137 N.R. 13 (F.C.A.) at 14

considered credible and requires no corroboration.³⁸³ This principle, as elaborated by the Federal Court of Canada, ensures that a refugee claimant's oral or written testimony should be seen as demonstrating the objective basis of a well-founded fear and not to be seen as proving subjective fear.³⁸⁴

Nevertheless, the Inter-agency Working Group on Unaccompanied and Separated Children, which comprises key organizations³⁸⁵ with field experience of issues concerning separated children, recommend that when assessing an individual child's refugee claim, decision-makers should give the benefit of the doubt to an unaccompanied minor when there are some concerns on the credibility of his or her story.³⁸⁶ In addition, children's age, their views and the need for expert assessment have to be taken into account in the refugee status determination of unaccompanied children.³⁸⁷

Even if an unaccompanied minor's testimony is found not to be credible, either in whole or in part, decision-maker at refugee determination hearing must assess the actual risk faced by a minor on the basis of other material evidence.³⁸⁸ Particularly, "the existence of a well-founded fear" could be based on evidence that the minor is a

³⁸³ *Lachowski v. Canada (M.E.I.)* (1992), 59 F.T.R. 44

³⁸⁴ Adjin-Tettey, "Reconsidering", *supra* note 62 at 138; See also Waldman, *The Definition of Convention Refugee*, *supra* note 86 (Although there might be an objective basis for a refugee claim, if the evidence of a refugee claimant has been rejected for lack of credibility, then there is no justification for his or her particular claim because the Refugee Division can legitimately determine that there is no subjective basis for the claim. "Assessment of credibility is therefore at the centre of any claim to refugee status" at para. 8.15). From this, it can be said that in the presence of credible and uncontradicted evidence, including a claimant's oral or written testimony that is credible, the refugee claim should be determined positively, even if there is no subjective element of the well-founded fear, as long as there is objective basis for the refugee claim.

³⁸⁵ The key organisations include International Committee of the Red Cross, International Rescue Committee, Save the Children UK, United Nations Children's Fund, United Nations High Commissioner for Refugees and World Vision International. See Inter-Agency, *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, UNHCR, UNICEF, ICRC, IRC, Save the Children UK & World Vision International, January 2004, online: UNHCR Refworld© < <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4113abc14>>

³⁸⁶ *Ibid.* at 60-61

³⁸⁷ *Ibid.*

³⁸⁸ See James C. Hathaway, "The Michigan Guidelines on Well-Founded Fear" (Guidelines represent the consensus of the participants at the Third Colloquium on Challenges in International Refugee Law, convened by James Hathaway for the Program in Refugee and Asylum Law at University of Michigan Law School, 26-28 March 2004), (2005) 26:2 Mich. J. Int'l L. 492

“member of a relevant, at-risk group of persons shown by credible country data or the credible testimony of other persons to face a significant risk of being persecuted.”³⁸⁹

To sum up, a broader single objective test that eliminates the requirement of subjective fear and that considers children’s testimony, even with some concerns of credibility and inconsistencies, as objective evidence would ensure that individual and special circumstances of unaccompanied minors are considered to ascertain their well-founded fear in the refugee determination process.³⁹⁰

In Canada, section 96 of the *IRPA*³⁹¹ requires both subjective and objective elements of the well-founded fear for all refugee claimants to qualify for refugee status. In the next part, it will be shown that requiring unaccompanied minors to establish both subjective fear and objective fear of the well-founded fear analysis violates their right to equality under section 15 of the Canadian Charter.³⁹² Furthermore, it will be shown that such a violation is not reasonable and not demonstrably justified in a free and democratic society under section 1 of the Canadian Charter.³⁹³

3 The Right to Equality of the Canadian Charter justifies a Single Objective Element for Unaccompanied Minors

The main idea of this part is to demonstrate that the right to equality of the Canadian Charter justifies using objective fear only for unaccompanied minors seeking asylum in Canada to determine their well-founded fear. It will be shown that requiring unaccompanied minors to establish both subjective fear and objective fear of the well-founded fear analysis violates their right to equality under section 15 of the Canadian

³⁸⁹ *Ibid.*

³⁹⁰ Refugee status should not be withheld from unaccompanied minors seeking asylum simply because of their inconsistent testimony with some concerns of credibility, if there is evidence pointing to a good chance of persecution if the child is returned to his or her home country (i.e. evidence of objective fear). Trauma experienced by children as a result of human rights abuse should be perceived as a reasonable explanation for flaws in their testimony. This position would ensure that ‘what is credible and consistent testimony’ is understood within the particular circumstances of each child refugee claimant.

³⁹¹ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96; See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27).

³⁹² *Charter*, *supra* note 58, s. 15

³⁹³ *Ibid.*, s. 1

Charter.³⁹⁴ It will be discussed whether such a violation is ‘prescribed by law’ within the meaning of section 1 of the Charter.³⁹⁵ In addition, whether there is a need to apply section 1 of the Canadian Charter to save a violation of section 15 of the Charter will also be discussed because of the blurring between the analysis of section 1 and section 15. Consequently, it will be shown that violation of section 15, with respect to unaccompanied minors seeking asylum in Canada, is not reasonable and not demonstrably justified in a free and democratic society under section 1 of the Canadian Charter.³⁹⁶ In this manner, it will be demonstrated that section 96 of the *IRPA* is unconstitutional. Finally, this part will conclude by discussing the remedies to systemic inequality, highlighting that reading in would be the most appropriate remedy.

3.1 Two Elements for Well-Founded Fear violate the Right to Equality of Unaccompanied Minors

The requirement of subjective element and objective element for the ‘well-founded fear’ in section 96 of the *IRPA*³⁹⁷ violates the right to equality of unaccompanied minors seeking refugee status in Canada. This will be critically analysed and demonstrated by applying the test for discrimination, as set out in *Law Society of British Columbia v. Andrews*,³⁹⁸ the purpose of equality rights and human dignity, and the three broad inquiries to find discrimination and the contextual factors elaborated in *Law v. Canada (Minister of Employment and Immigration)*.³⁹⁹ In addition, the problem of identifying the proper comparator group will also be discussed.

It should be noted that in *Law v. Canada (Minister of Employment and Immigration)*,⁴⁰⁰ the Supreme Court of Canada synthesized the Court’s jurisprudence on

³⁹⁴ *Ibid.*, s. 15

³⁹⁵ *Ibid.*, s. 1

³⁹⁶ *Ibid.*

³⁹⁷ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27).

³⁹⁸ *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 [*Andrews*]

³⁹⁹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]

⁴⁰⁰ *Ibid.*

equality rights. The analytical framework set out in *Law*⁴⁰¹ has established the current platform to assess equality rights.⁴⁰² *Law*⁴⁰³ is the most important Charter equality decision since *Andrews*.⁴⁰⁴ Briefly, the test for discrimination as elaborated in *Law Society of British Columbia v. Andrews*⁴⁰⁵ will be analyzed first in the context of unaccompanied minors, before applying the more authoritative test to find discrimination as elaborated in *Law v. Canada (Minister of Employment and Immigration)*.⁴⁰⁶

3.1.1 Applying the Test for Discrimination

In *Law Society of British Columbia v. Andrews*,⁴⁰⁷ the main question was whether any distinction of any kind in the law constitutes a *prima facie* violation of the protection against discrimination set out under section 15 of the Canadian Charter.⁴⁰⁸ This case considered whether the provincial legislation contravened section 15 of the Canadian Charter by imposing a citizenship requirement on the entry to the legal profession. In *Andrews*,⁴⁰⁹ the Supreme Court of Canada agreed with the Court of Appeal for British Columbia that the citizenship requirement was discriminatory. However, the Supreme Court rejected the proposition that any distinction in a law would

⁴⁰¹ *Ibid.*

⁴⁰² Fay Faraday, Margaret Denike & M. Kate Stephenson, "In Pursuit of Substantive Equality" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 9 at 14

⁴⁰³ *Law*, *supra* note 399

⁴⁰⁴ *Andrews*, *supra* note 398

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Law*, *supra* note 399

⁴⁰⁷ *Andrews*, *supra* note 398

⁴⁰⁸ *Charter*, *supra* note 58, s. 15, where s. 15(1) states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". S. 15(2) states that "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

⁴⁰⁹ *Andrews*, *supra* note 398

constitute a *prima facie* violation of section 15 of the Canadian Charter.⁴¹⁰ Furthermore, the Supreme Court of Canada rejected the Court of Appeal's "reasonable and fair test", which would deprive the meaningful function of section 1 of the Canadian Charter, because it would be self-contradictory for an unreasonable and unfair distinction to be a reasonable limit demonstrably justified in a free and democratic society.⁴¹¹ The "reasonable and fair test" asked whether or not an impugned distinction was reasonable and fair, having regard to the purposes and aims of the distinction and to its effect on the person concerned.

As an alternative, the Supreme Court of Canada limited section 15 of the Canadian Charter to discrimination based on grounds enumerated in section 15 or analogous to those grounds.⁴¹² Furthermore, the Court stated that the test for discrimination does not involve applying a rule uniformly to everyone because the rule might have different effects on different persons. Justice McIntyre described discrimination

as a distinction, intentional or non intentional, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.⁴¹³

He also stated that distinctions based on "an individual's merits and capacities will rarely be so classed".⁴¹⁴

The test for discrimination, as implied in *Andrews*,⁴¹⁵ could be applied to achieve equality rights for unaccompanied minors seeking asylum in Canada, so as to redefine the criteria of well-founded fear as consisting of single objective element which would meet their needs. Presently, unaccompanied minors seeking asylum in Canada are being subjected to the same criteria of well-founded fear, which consists of subjective fear and

⁴¹⁰ *Ibid.* (McIntyre J.)

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.* at 174, para. 37

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

objective fear, as adult refugee claimants under section 96 of the *IRPA*.⁴¹⁶ Vulnerability and the special needs of unaccompanied minors call for a child sensitive criteria of well-founded fear, which would contain only a single objective element. Legal rules should not be applied uniformly to everyone since they might have different effects on different persons. Discrimination would result if children's special needs, disadvantages, vulnerability and their personal characteristics were not taken into consideration.

Likewise, in *R. v. Turpin*,⁴¹⁷ the Supreme Court of Canada again noted that the test for discrimination is not the uniform application of a rule to everyone and explained that it could only determine, in a larger context, "whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage". The Court added that discrimination finding would necessitate a search for disadvantage, which exists independently and away from the legal distinction that is being challenged.⁴¹⁸ Accordingly, identical treatment of unaccompanied minors and adult refugee claimants by the uniform application of the criteria of well-founded fear of persecution, considering the particular context of minors' vulnerability, immaturity and the absence of parental support, would result in inequality for unaccompanied minors. Alternatively, such identical treatment would also foster the minors' disadvantaged situation.

In fact, in *Andrews*⁴¹⁹ and in *Turpin*,⁴²⁰ the central focus was on reduction of conditions of disadvantage. This means that the idea behind equality rights is to reduce the conditions of disadvantage. Therefore, applying the traditional criteria of well-founded fear, which requires subjective fear and objective fear, to unaccompanied minors and adult refugee claimants, alike, would not reduce the conditions of disadvantage for unaccompanied minors.

⁴¹⁶ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96; See *Jarada*, *supra* note 63 ("There are subjective and objective components to section 96 [of the *IRPA*]" at para. 27)

⁴¹⁷ *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331 and 1332, para. 45 [*Turpin*]

⁴¹⁸ *Ibid.*

⁴¹⁹ *Andrews*, *supra* note 398 at 152

⁴²⁰ *Turpin*, *supra* note 417 at 1331-1332

Rather than inquiring whether a ground is enumerated or analogous, in *Egan v. Canada*,⁴²¹ Justice L'Heureux-Dubé proposed to examine two factors. The first factor involves determining the nature of the group affected to see whether it is a socially vulnerable group and whether the distinction is based on attributes that are essential to personhood. For instance, in *Egan*,⁴²² the group actually affected was homosexual couples. Thus, the first factor would involve examining the actual group affected rather than looking at the ground of discrimination, which is sexual orientation. The second factor is to examine the nature of the interest affected and to determine its importance to the group in question. Therefore, Justice L'Heureux-Dubé proposed to weigh these two factors so as to determine whether the impact on the group in question is of such a nature to be judged as discriminatory. However, her approach was not adopted by the majority, which preferred to retain the enumerated and analogous grounds test. Nevertheless, the approach suggested by Justice L'Heureux-Dubé has influenced the guiding principles in *Law v. Canada (Minister of Employment and Immigration)*.⁴²³

The two factors approach, proposed by Justice L'Heureux-Dubé, can be applied to unaccompanied minors seeking asylum in Canada to reduce their disadvantaged situation and to establish their well-founded fear of persecution. The first factor would involve examining the actual group affected (i.e. unaccompanied minors) rather than looking at the ground of discrimination, which is age. The second factor would be to examine the nature of the interest affected, which is refugee protection, and its importance to unaccompanied minors. Weighing the two factors, the impact of having the same criteria of well-founded fear of persecution for unaccompanied minors and adult refugee claimants, would have a tremendous negative impact, of denial of refugee protection, on unaccompanied minors, who might fail to establish the adult centered criteria (requiring subjective fear and objective fear), due to their immaturity, vulnerability, inexperience and lack of parental guidance and support. Moreover,

⁴²¹ *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 55-69 [*Egan*]

⁴²² *Ibid.*

⁴²³ *Law*, *supra* note 399 (In deciding whether there is discrimination, the fourth contextual factor in *Law* uses Justice L'Heureux Dubé's consideration of the nature of the interest affected).

children are known as a historically disadvantaged group.⁴²⁴ Their special vulnerability has been recognized by the Supreme Court of Canada.⁴²⁵ Unaccompanied minors are vulnerable as children, as refugees and lacking parental guidance and support. Requiring unaccompanied minors to establish the same criteria of well-founded fear, consisting of subjective fear and objective fear, as adults would eventually lead to denial of refugee protection for these minors. This is because a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms”.⁴²⁶ Therefore, by weighing the two factors proposed by Justice L’Heureux-Dubé, the impact (of applying the same criteria of well founded fear that consists of subjective fear and objective fear) on unaccompanied minors is of such a nature that can be deemed as discriminatory. For this reason, having the same criteria of well-founded fear for unaccompanied minors and adults would be deemed discriminatory for minors. In this way, applying the test of two factors approach, as proposed by Justice L’Heureux-Dubé,⁴²⁷ violation of section 15 of the Canadian Charter can be found in favor of unaccompanied minors seeking asylum in Canada.

In the following parts, an outline of the approach to section 15 of the Canadian Charter from *Law v. Canada (Minister of Employment and Immigration)*⁴²⁸ and subsequent cases will be elaborated, critically analyzed and applied to the situation of unaccompanied minors seeking asylum in Canada.

To begin with, the purpose of section 15 of the Canadian Charter and the concept of human dignity will be analyzed, in the context of asylum seeking unaccompanied minors in search of equality rights.

3.1.2 Applying the Purpose of Equality Rights and Human Dignity

⁴²⁴ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 56 [*Canadian Foundation*]

⁴²⁵ *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 at para. 73 [*Winnipeg Child & Family Services*]

⁴²⁶ *Yusuf*, *supra* note 202

⁴²⁷ *Egan*, *supra* note 421 at paras. 55-69

⁴²⁸ *Law*, *supra* note 399

The purpose of section 15 of the Canadian Charter is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice” in order to promote a society where everyone can enjoy “equal recognition at law...equally capable and equally deserving of concern, respect and consideration”.⁴²⁹ The reference to disadvantage points to the impact of the impugned law on the equality claimant.⁴³⁰ Accordingly, this would mean that any imposition of disadvantage by the impact of section 96 of the *IRPA*, on unaccompanied minors seeking asylum in Canada, has to be prevented so that they could enjoy equal recognition at law as human beings and members of Canadian society, equally deserving concern, respect and consideration. According to William Black and Lynn Smith, the purpose of section 15 of the Canadian Charter would have a dual focus of “ensuring the propriety of government decision making and the rectification of disadvantage, whether or not that disadvantage arises from prejudice or stereotyping”.⁴³¹

Justice L’Heureux-Dubé had stated that the essence of equality rights is in the advancement and protection of “essential human dignity” in *Egan*.⁴³² Similarly, in *Law*,⁴³³ the Court stated that human dignity “is enhanced by laws which are sensitive to the needs, capacities, and merits of different individual, taking into account the context underlying their differences”. The Court added that “[h]uman dignity is harmed when individuals and groups” are ignored, but it “is enhanced when laws recognize the full place of all individuals and groups within Canadian society”.⁴³⁴ Human dignity concerns the way “in which a person legitimately feels when confronted with a particular law” and inquires whether the law had treated the individual unfairly, taking into account all the circumstances concerning the individual affected by the law.⁴³⁵

⁴²⁹ *Law*, *supra* note 399 at para. 51

⁴³⁰ William Black & Lynn Smith, “The Equality Rights” (2005) 27 S.C.L.R. (2d) 315 at 327

⁴³¹ *Ibid.*

⁴³² *Egan*, *supra* note 421 at para. 39

⁴³³ *Law*, *supra* note 399 at para. 53

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

Applying the concept of human dignity to unaccompanied minors seeking asylum in Canada would mean that their human dignity would be enhanced if section 96 of the *IRPA* is made sensitive to their needs and capacities.⁴³⁶ To ensure human dignity of unaccompanied minors, inquiry has to be made if section 96 of the *IRPA* has treated unaccompanied minors unfairly by failing to take into account all the circumstances concerning them. Hence, the essence of equality rights of unaccompanied minors seeking asylum in Canada would be to protect and advance their essential human dignity.

Nevertheless, the concept of human dignity has invited approval as well as criticisms.⁴³⁷ For instance, Donna Greshner had highlighted that, according to the courts, this concept underlies the Canadian Charter as a whole, although the concept of human dignity is too general to identify the distinctive role of section 15 of the Canadian Charter or to offer guidance in equality claims, thereby, shutting down legitimate debate.⁴³⁸ Sheilah Martin, on the other hand, argues that, rather than providing a remedy for group-based historical disadvantage, the concept of human dignity is more consistent with individual rights.⁴³⁹ Professor Peter Hogg finds the element of human dignity as “vague, confusing and burdensome to equality claimants”.⁴⁴⁰ He argues that Justice Iacobucci in *Law*⁴⁴¹ did not define human dignity but just suggested four contextual factors that were helpful to the inquiry.⁴⁴² Furthermore, Peter Hogg argues that human dignity is burdensome because any increase in the elements of section 15 has the

⁴³⁶ For instance, the UNHCR has noted that children’s age, maturity and their dependency on others for life, survival and development “can make them less willing or able to express their [subjective] fears and needs”: See UNHCR, *Children At Risk*, *supra* note 61 at 2. Therefore, when section 96 of the *IRPA* is made to recognize a single objective element for the ‘well-founded fear’ for unaccompanied minors, their human dignity will be enhanced because it concerns how unaccompanied minors feel when they are confronted by section 96 of the *IRPA* with its traditional criteria of well-founded fear, which requires subjective fear and objective fear.

⁴³⁷ Black & Smith, *supra* note 430 at 325

⁴³⁸ Donna Greshner, “The Purpose of Canadian Equality Rights” (2002) 6 Rev. Const. Studies 291 at 302, 316-321

⁴³⁹ Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 Can. Bar. Rev. 299 at 329

⁴⁴⁰ Peter W. Hogg, “What is Equality? The Winding Course of Judicial Interpretation” (2005) 29 S.C.L.R. (2d) 39 at 56 [Hogg, “What is Equality?”]

⁴⁴¹ *Law*, *supra* note 399

⁴⁴² Hogg, “What is Equality?”, *supra* note 440 at 56

undesirable effect of increasing the burden on the equality claimant.⁴⁴³ Christopher Essert argues that although subsequent jurisprudence after *Law*⁴⁴⁴ confirms that dignity remains the motivating force behind section 15 rights, neither jurisprudence nor *Law* clearly defines dignity or its role in equality analysis.⁴⁴⁵ Focusing on human dignity carries some risks to encourage intentional discrimination and underestimating the discriminatory consequences of unintended adverse effects.⁴⁴⁶ On the other hand, Denise Réaume argues that by selecting human dignity as the substantive concept for equality rights, the Supreme Court of Canada is on the right path.⁴⁴⁷ Despite the statements of approval for the concept of human dignity, “the new requirement of an impairment of human dignity”⁴⁴⁸ in *Law*⁴⁴⁹ would still be an added burden on unaccompanied minors to achieve equality rights under section 15 of the Canadian Charter to establish an impairment of their human dignity. Moreover, human dignity is a highly subjective concept that is very much in the eye of the beholder.⁴⁵⁰ When a test is more subjective, equality litigation becomes more unpredictable,⁴⁵¹ making it more difficult for unaccompanied minors to show violation of their equality right under section 15 of the Charter.

3.1.3 Applying Three Broad Inquiries to find Discrimination

In *Law v. Canada (Minister of Employment and Immigration)*,⁴⁵² the Supreme Court of Canada articulated the basic principles of section 15(1) of the Canadian Charter

⁴⁴³ *Ibid.* at 57

⁴⁴⁴ *Law*, *supra* note 399

⁴⁴⁵ Christopher Essert, “Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15” (2006) 19 Can. J.L. & Juris. 407 at 409

⁴⁴⁶ Black & Smith, *supra* note 430 at 326

⁴⁴⁷ Denise Réaume, “Discrimination and Dignity” (2003) 63 La. L. Rev. 645

⁴⁴⁸ Hogg, “What is Equality?”, *supra* note 440 at 55

⁴⁴⁹ *Law*, *supra* note 399

⁴⁵⁰ Debra M. McAllister, “Section 15 – The Unpredictability of the *Law* Test” (2003) 15 N.J.C.L. 35 at 65

⁴⁵¹ *Ibid.* at 65

⁴⁵² *Law*, *supra* note 399 at para. 6

as guidelines for the assessment of equality claims, recognizing that equality analysis must be purposive and contextual. Writing for the Court, Justice Iacobucci added that relevant contextual factors have to be identified and their effects have to be evaluated in light of the purpose of section 15(1) of the Canadian Charter.⁴⁵³ Three broad inquiries, accompanied by a detailed set of guidelines and contextual factors, were mapped out as part of the process.⁴⁵⁴

The three broad inquiries to find discrimination under section 15(1) of the Canadian Charter are as follows:

A) Does the impugned law or program either a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? B) Is the claimant subject to differential treatment on one or more enumerated and analogous grounds? and C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?⁴⁵⁵

Each step of the inquiry will be guided by section 15's purpose to protect human dignity and freedom.⁴⁵⁶ At the third step of inquiry, contextual factors will be analyzed to see if the dignity of the claimant is impaired, and thus, any infringement of section 15(1) of the Canadian Charter's equality guarantee will be determined.⁴⁵⁷ Though not all of them are relevant in every case, the contextual factors are: 1) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue; 2) the degree of correspondence between the ground on which the claim is based and the actual need, capacity or circumstances of the claimant or others; 3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.* at paras. 39, 62-75, 88

⁴⁵⁵ *Ibid.* at para. 88

⁴⁵⁶ Donna Greschner, "Case Comment: Does Law Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299 at 301 [Greschner, "Case Comment"]

⁴⁵⁷ *Ibid.*

or group in society; and 4) the nature and scope of the interest affected by the impugned law.⁴⁵⁸

Differential treatment can arise if laws “fail to take into account of the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment”.⁴⁵⁹ For this reason, in *Eldridge v. British Columbia (Attorney General)*,⁴⁶⁰ there was no indication that the failure to provide interpreters during medical treatment for people who are deaf was based on prejudice; instead the problem arose from the failure to take into account the claimants’ needs rather than from any stereotype or prejudice.⁴⁶¹

Amongst the three broad inquiries, the wording of part b) of the first inquiry indicates that section 15 of the Canadian Charter extends its protection beyond formal legal distinctions and covers unequal outcomes that could arise from the failure to make a distinction.⁴⁶² Hence, the reference, failure “to take into account the claimant’s” previously disadvantaged situation resulting in inequality and resulting in “substantively differential treatment” reaffirms that the assessment must consider broader social, economic and legal contexts.⁴⁶³ Although, substantively differential treatment can arise from a distinction on the face of a law, substantive equality often requires distinctions be made so that the actual situation of individuals is also taken into account.⁴⁶⁴ For this reason, a duty to accommodate difference is an essential element of substantive equality.⁴⁶⁵

To prove violation of section 15 of the Canadian Charter, claiming that section 96 of the *IRPA* discriminates unaccompanied minors by failing to provide them with a single objective element for the ‘well-founded fear’ but requiring them to establish subjective and objective elements for the ‘well-founded fear’ like adult refugee

⁴⁵⁸ *Law*, *supra* note 399 at para. 88

⁴⁵⁹ *Ibid.* at para. 39

⁴⁶⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*]

⁴⁶¹ *Black & Smith*, *supra* note 430 at 327

⁴⁶² *Ibid.* at 330

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.* at 330; See *Eldridge*, *supra* note 460

⁴⁶⁵ *Black & Smith*, *ibid.*

claimants, would involve discussion of the three broad inquiries set out in *Law*.⁴⁶⁶ In *Gosselin v. Quebec (Attorney General)*, the Supreme Court of Canada had summarized these three broad inquiries set out in *Law* requiring the claimant to prove that:

1) the law imposes differential treatment between the claimant and others, in purpose or effect; 2) one or more enumerated or analogous grounds are the basis for the differential treatment; and 3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds.⁴⁶⁷

From the first inquiry, section 96 of the *IRPA* imposes a differential treatment between unaccompanied minors (equality claimants) and adult asylum seekers, in effect. The effect of section 96 of the *IRPA* is requiring unaccompanied minors to establish the subjective and objective elements of the well-founded fear like adult refugee claimants, thereby, causing them to risk denial of refugee protection accorded to them, due to their added disadvantage of vulnerability and/or immaturity due to age and their status of being unaccompanied without parental support. Furthermore, from part b) of the first inquiry set out in *Law*,⁴⁶⁸ section 96 of the *IRPA* fails to take into account the unaccompanied minors' disadvantaged position within Canadian society resulting in substantively differential treatment between them and others on the basis of one or more personal characteristics such as age and the status of minors being unaccompanied. Here, the differential treatment arises because section 96 of the *IRPA* fails to take into account the needs and disadvantaged position of unaccompanied minors, like in *Eldridge*,⁴⁶⁹ where the problem arose from the failure to consider the equality claimants' needs rather than from any stereotype.

From the second inquiry, one or more enumerated or analogous grounds are the basis for differential treatment of unaccompanied minors. Section 15 of the Canadian Charter covers only differential treatment based on grounds relating to personal characteristics that are listed in that section, which are enumerated as race, national or ethnic origin, colour, religion, sex, age or membership or physical disability, or are

⁴⁶⁶ *Law*, *supra* note 399 at para. 88

⁴⁶⁷ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 17 [*Gosselin*]

⁴⁶⁸ *Law*, *supra* note 399 at para. 88

⁴⁶⁹ *Eldridge*, *supra* note 460

analogous to those listed grounds.⁴⁷⁰ Age, being one of the enumerated grounds, is the basis for the substantively differential treatment of unaccompanied minors. In addition, the status of asylum seeking minors being unaccompanied can be argued to be an analogous ground because “identification of analogous grounds” reveals grounds that are based on characteristics that cannot be changed “or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law”.⁴⁷¹ Furthermore, the status of children being unaccompanied minors can be argued to be an analogous ground, like marital status,⁴⁷² citizenship⁴⁷³ and off-reserve Indian membership⁴⁷⁴ that are grounds found to be analogous by the Supreme Court of Canada. Therefore, age and the status of minors being unaccompanied, which are enumerated and analogous grounds respectively, are the basis of the challenged substantively differential treatment.⁴⁷⁵ Thus, unaccompanied minors are subjected to differential treatment on one or more enumerated and analogous grounds.

From the third inquiry, section 96 of the *IRPA* has effect that is discriminatory in the sense that it treats unaccompanied minors as less worthy on the enumerated ground of age and on the analogous ground, which is the status of minors being unaccompanied. This is because the law imposes a burden on them to establish, like adults, subjective fear and objective fear of the well-founded fear, by not taking into account their vulnerability and/or immaturity due to their age and their status of lacking parental support and guidance, and thereby, risking denial of refugee protection. The status of minors being unaccompanied has to be considered by section 96 of the *IRPA* because in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney*

⁴⁷⁰ Black & Smith, *supra* note 430 at 330

⁴⁷¹ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13 (McLachlin and Bastarache JJ.) [*Corbiere*]

⁴⁷² *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325

⁴⁷³ *Andrews*, *supra* note 398

⁴⁷⁴ *Corbiere*, *supra* note 471

⁴⁷⁵ This is because section 96 of the *IRPA* fails to take these two grounds into account for unaccompanied minors, when requiring them to establish the subjective and objective elements of the well-founded fear like adult refugee claimants instead of requiring a single objective element for the ‘well-founded fear’, which would be a child-sensitive criteria. See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27).

General),⁴⁷⁶ Chief Justice McLachlin has noted that while children are highly vulnerable and need protection, they are also vitally dependent on their parents.

Moreover, to demonstrate discrimination, a claimant need not prove an intent to discriminate but it will be sufficient to show proof that a law has an unintended effect on the individual or group.⁴⁷⁷ For instance, in *Symes v. Canada*,⁴⁷⁸ the Court accepted that the provisions of *Income Tax Act* on child care expenses would violate section 15 of the Canadian Charter if these provisions were to have an unintended adverse effect on women, although in that case this effect was not proven. Likewise, unintended adverse effect of a law on unaccompanied minors would constitute discrimination. Here, section 96 of the *IRPA* violates section 15 of the Canadian Charter because section 96 of the *IRPA* has a discriminatory effect through the treatment of unaccompanied minors as less worthy.⁴⁷⁹

In essence, the *Law*⁴⁸⁰ decision “reaffirms earlier cases saying that the test is not whether a law” applies in an identical way to everyone because “discrimination is measured in terms of substantive outcomes and requires” to see beyond the terms of the challenged law.⁴⁸¹ This implies a sophisticated and complex test to determine substantive discrimination.⁴⁸² This means that the traditional criteria of well-founded fear which requires subjective and objective elements, under section 96 of the *IRPA*, should not be applied in a similar fashion to unaccompanied minors and adult asylum seekers in Canada. Therefore, through the application of the subjective and objective elements of the well-founded fear under section 96 of the *IRPA*, there is substantive discrimination on asylum seeking unaccompanied minors in Canada.

⁴⁷⁶ *Canadian Foundation*, *supra* note 424 at paras. 56 and 58

⁴⁷⁷ Black & Smith, *supra* note 430 at 336-337

⁴⁷⁸ *Symes v. Canada*, [1993] 4 S.C.R. 695 at 753-772

⁴⁷⁹ Section 96 of the *IRPA* imposes a burden on minors to establish, like adults, the subjective and objective elements of the well-founded fear, failing to take into account the age and the unaccompanied status of these minors, thereby, risking a denial of their refugee protection. Therefore, it can be said that unaccompanied minors are treated as less worthy and that section 96 of the *IRPA* has a discriminatory effect.

⁴⁸⁰ *Law*, *supra* note 399

⁴⁸¹ Black & Smith, *supra* note 430 at 336

⁴⁸² *Ibid.*

3.1.4 Applying the Contextual Factors

The Court in *Law*⁴⁸³ established four contextual factors to determine if there is discrimination. These factors do not comprise of an exhaustive list nor are all of them applicable in every case. The four contextual factors are 1) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue; 2) the degree of correspondence between the ground on which the claim is based and the actual need, capacity or circumstances of the claimant or others; 3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and 4) the nature and scope of the interest affected by the impugned law.⁴⁸⁴ Although Justice Iacobucci had meant that the contextual factors apply to all stages of section 15 analysis, however, in *Law*⁴⁸⁵ and in subsequent cases, these factors have only been considered at the third stage, when determining whether there is substantive discrimination.⁴⁸⁶ As explained by Justice Iacobucci, the four contextual factors would seek to illumine the substantive approach, rather than the formal approach to the Charter's equality guarantees.⁴⁸⁷ These four factors are interconnected logically.⁴⁸⁸

As Donna Greschner notes, to improve a substantive analysis for section 15 of the Canadian Charter, the Supreme Court of Canada should assess the contextual factors carefully to ensure the relevance test or any other formalist method does not reappear through indiscriminate choice of these factors.⁴⁸⁹ In addition, it is necessary to ensure that the content of the contextual factors are not altered or misapplied so that they will obliterate the meaning of section 15.⁴⁹⁰

Sheila McIntyre notes that it is almost certain to indicate and establish a second class status and be discriminatory where a distinction either “reflects or reinforces pre-

⁴⁸³ *Law*, *supra* note 399 at para. 62-75

⁴⁸⁴ *Ibid.* at para. 88

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Black & Smith, *supra* note 430 at 338

⁴⁸⁷ *Law*, *supra* note 399 at para. 62-75

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Greschner, “Case Comment”, *supra* note 456 at 311

⁴⁹⁰ *Ibid.*

existing disadvantage, prejudice or marginalization (factor one) and/or denies or abridges a significant social, political or economic interest on a suspect ground (factor four)".⁴⁹¹ However, she notes that not all distinctions affecting disadvantaged groups are *per se* discriminatory.⁴⁹² Distinction will not infringe section 15 of the Canadian Charter where "the distinction recognizes and accommodates or seeks to ameliorate real differences of need or capacity arising from disadvantage (factors two and three)".⁴⁹³ Therefore, the four contextual factors unite to state that section 15 of the Canadian Charter will be infringed when distinctions reinforce the effects of inequality and that there will be no such infringement when distinctions reduce the effects of inequality.⁴⁹⁴

Accordingly, there will be no infringement of section 15 of the Canadian Charter, when section 96 of the *IRPA* incorporates a single objective element for the 'well-founded fear' in the case of unaccompanied minors, taking into account their age, unaccompanied status and needs to reduce the effects of inequality. Moreover, requiring objective fear exclusively for the 'well-founded fear' and eliminating the requirement of subjective fear for asylum seeking unaccompanied minors will not infringe section 15 of the Charter because this distinction accommodates and ameliorates real differences of minors' needs and capacities arising from their disadvantage of vulnerability and/or immaturity based on their age and status of being unaccompanied.

Next, each of the four contextual factors will be critically analyzed and applied to a claim of equality rights of unaccompanied minors seeking asylum in Canada. However, the factor on ameliorative purpose/effect will not be applied to the context of unaccompanied minors seeking asylum in Canada because it is not applicable to determine if there is discrimination. There is no ameliorative effect because section 96 of the *IRPA* is not designed to ameliorate the condition of another more disadvantaged group. As noted by the Supreme Court of Canada in *Law*,⁴⁹⁵ it is not necessary that all

⁴⁹¹ Sheila McIntyre, "Deference and Dominance: Equality Without Substance" (2006) 33 S.C.L.R. (2d) 95 at 101

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*; *Law*, *supra* note 399 at paras. 69-72; *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 42, Bastarache J. [*Lavoie*]

⁴⁹⁴ McIntyre, *ibid.* at 101

⁴⁹⁵ *Law*, *supra* note 399 at paras. 62-75

of the contextual factors are applicable in every case to determine if there is discrimination.

3.1.4.1 Pre-existing Disadvantage

The first contextual factor is “the most compelling factor favoring a conclusion that differential treatment imposed by legislation is truly discriminatory” when there exists “pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group”.⁴⁹⁶ This factor is relevant because the equality claimant has already been subjected to unfair circumstances or treatment in the society because of his or her personal characteristics or circumstances and people like him or her are not recognized with equal concern, respect and consideration.⁴⁹⁷ For this reason, it follows the logical conclusion that any further differential treatment will add to perpetuating or promoting their unfair social characterization and will lead to severe impact on them due to their vulnerability.⁴⁹⁸

Accordingly, in *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*,⁴⁹⁹ the Court had noted the particular vulnerability of children and the dependence of children on parents and caregivers for the necessities of life. In *Canadian Foundation*⁵⁰⁰ case, Justice Deschamps noted, in her dissenting opinion, the pre-existing disadvantage of children as a vulnerable and powerless group. Therefore, unaccompanied minors seeking asylum have a pre-existing disadvantage and particular vulnerability as children, and lacking parental support. In this manner, they have already been subjected to unfair circumstances in the society because of their personal characteristics.

Arguably, asylum seeking unaccompanied minors experience stereotyping that parents who wish to immigrate to developed countries like Canada for better economic prospects, would send their children first as unaccompanied minors to seek refugee

⁴⁹⁶ *Ibid.* at para. 63

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Winnipeg Child & Family Services*, *supra* note 425 at para. 73

⁵⁰⁰ *Canadian Foundation*, *supra* note 424 at para. 231

status easily so that parents could unite with their children later. This can be seen subtly with regard to family reunification⁵⁰¹ in Canada where

[r]efugee children are not entitled to include their parents or siblings on their application for permanent resident status, in contrast to adult refugees, who may include their spouse and dependent children. Instead, children must attain eighteen years of age and meet the financial sufficiency requirements for sponsorship through the family class program before they can sponsor parents.⁵⁰²

Despite the fact that this situation is very difficult for children and can lead to psychological problems, depression, or feelings of guilt,⁵⁰³ “the exclusion of family members is justified as a means to prevent families from using their children as an anchor to secure their own resettlement”.⁵⁰⁴ At present, parents of children accepted as

⁵⁰¹ See Canadian Council For Refugees, Media Release, “Legislative amendments will hurt family reunification for children” (17 March 2008), online: Chaire de Recherche du Canada en droit international des migrations <<http://cdim.cerium.ca/Legislative-amendments-will-hurt>> (There are two situations where children do not have a right to family reunification and where humanitarian and compassionate applications are the only recourse: First, under the *IRPA*, separated refugee children in Canada cannot apply for family reunification with their parents and siblings who are outside Canada. The only way for these children to be reunited with their parents and siblings is through humanitarian and compassionate consideration. Second, the excluded family member rule, which is Regulation 117(9)(d), keeps many children unfairly separated from their parents. The only way for affected families to explain why they should be able to reunite is through a humanitarian and compassionate application.);

See Canadian Council For Refugees, “Impacts on children of the *Immigration and Refugee Protection Act*” (November 2004), online: Canadian Council For Refugees <<http://www.ccrweb.ca/children.pdf>> at 6. (In regard to family reunification, the “*IRPA* provides no avenue by which refugee children in Canada can be reunited with their parents and siblings who are outside Canada. Adult refugees can apply to reunite with family members by applying for permanent residence and including their spouse and dependent children on the application. By contrast, minors who are found to be refugees in Canada can only apply for permanent residence for themselves, and cannot include their parents and siblings [because of the definition of “family member” in *Immigration and Refugee Protection Regulations*, 176(1) and 1(3)]. This means that the law offers no way to be reunited with their family” because family class sponsorship, which is the avenue for most family reunification under the *IRPA*, is not available for minors, since sponsors must be at least 18 years of age. Even once they reach the age of 18, only a few young people are able to sponsor their parents since sponsors must meet certain income requirements.)

⁵⁰² See Sandra Elgersma, “Unaccompanied and Separated Minors as Refugee Claimants” PRB 07-15E, Library of Parliament- Parliamentary Information and Research Service (11 October 2007), online: Publications List-Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/prb0715-e.htm>>

⁵⁰³ See Testimony before the committee, Standing Senate Committee on Human Rights, *Proceedings*, 6 November 2006, 13:45, cited in Elgersma, *supra* note 502

⁵⁰⁴ See Elgersma, *ibid.*; See Canadian Council For Refugees, “Impacts on children of the *Immigration and Refugee Protection Act*”, *supra* note 501 (“[G]overnment wants to discourage families from sending children on their own to make a claim in Canada and then serve as “anchors” for parents and other siblings to follow. Some lawyers have challenged the exclusion of the parents of refugees who are minors from definition of “family member”, arguing that this exclusion contravenes the children’s rights to “security of the person” under section 7 of the Charter, and discriminates against them on grounds of age, contrary to section 15 of the Charter. The lawyers for the Department of Justice have said that this

refugees in Canada can submit a humanitarian and compassionate application to try to be resettled with their children.⁵⁰⁵ However, such applications are discretionary, which means that the result depends on the individual officer making the decision.⁵⁰⁶ To make matters worse, the proposed amendments to the *Immigration and Refugee Protection Act* included in the budget bill, C-50, particularly the elimination of the obligation to study humanitarian applications outside Canada will “take away the right to have an application for humanitarian consideration examined, even though this is the only option under the immigration law” for “children seeking to be reunited with their parents”.⁵⁰⁷ In fact, in 2007, a study by the Standing Senate Committee on Human Rights had recommended that Canada improve family reunification.⁵⁰⁸

Generally speaking, whether or not any stereotyping of unaccompanied minors exists in Canada, it has to be noted that one of the dual purpose of section 15 of the Canadian Charter would be “the rectification of disadvantage, whether or not that disadvantage arises from prejudice or stereotyping”.⁵⁰⁹

As a primary measure to determine whether a law discriminates is to see whether or not the law reinforces or reduces pre-existing disadvantage.⁵¹⁰ In fact, until *Law*,⁵¹¹ reducing the conditions of disadvantage has been the central purpose of section 15 of the Canadian Charter.⁵¹² The fact that only the first and the third contextual factors in *Law* explicitly consider disadvantage and the new accent on human dignity shadow a doubt whether the purpose of reducing the pre-existing disadvantage still has its importance

exclusion is necessary so that unscrupulous parents won’t send their children alone to Canada to make refugee claims in order to establish a “beachhead” in Canada” at 6)

⁵⁰⁵ See Elgersma, *supra* note 502

⁵⁰⁶ Canadian Council For Refugees, “Impacts on children of the *Immigration and Refugee Protection Act*”, *supra* note 501 at 6.

⁵⁰⁷ Canadian Council For Refugees, “Legislative amendments will hurt family reunification for children” , *supra* note 501

⁵⁰⁸ See also Standing Senate Committee on Human Rights, *Children: The Silenced Citizens*, April 2007, cited in Elgersma, *supra* note 502

⁵⁰⁹ Black & Smith, *supra* note 430 at 327 (The purpose of section 15 of the Canadian Charter would have a dual focus of “ensuring the propriety of government decision making and the rectification of disadvantage, whether or not that disadvantage arises from prejudice or stereotyping”).

⁵¹⁰ *Ibid.* at 339

⁵¹¹ *Law*, *supra* note 399

⁵¹² Black & Smith, *supra* note 430 at 339

today as before.⁵¹³ Furthermore, as it can be seen in *Trociuk v. British Columbia (Attorney General)*,⁵¹⁴ the first contextual factor does not seem to have its importance of being the “probably the most compelling factor” in all cases. Therefore, accordingly, it is important to measure whether section 96 of the *IRPA* discriminates unaccompanied minors, who are seeking asylum in Canada, by seeing whether it reduces their pre-existing disadvantage. By requiring them to prove both subjective fear and objective fear, section 96 of the *IRPA* does not reduce the pre-existing disadvantage of unaccompanied minors. This is because children’s dependency on others, children’s age and their maturity are linked to their inability or unwillingness to express their subjective fears and needs.⁵¹⁵

Next, it is necessary to consider whether disadvantage should be measured with respect to a general population or a comparator group.⁵¹⁶ In *Lovelace v. Ontario*,⁵¹⁷ the Court was faced with an equality claimant and a comparator group, where both of them were disadvantaged when compared with respect to the larger society. Here, the Court decided that the relative disadvantage of the claimant, comparing with the comparator group, need not be a fifth contextual factor in *Law*. Similarly, in *Nova Scotia (Workers’ Compensation Board) v. Martin*,⁵¹⁸ the equality claimants and their comparator group were both disadvantaged. The Court, in this case, stated that disadvantage with respect to the comparator group can assist a claimant; nevertheless, absence of such disadvantage would be a neutral factor if the claimant is a member of a larger group,

⁵¹³ *Ibid.*

⁵¹⁴ *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 at paras. 20-22

⁵¹⁵ UNHCR, *Children At Risk*, *supra* note 61 (“Children’s dependency on others...make them less willing or able to express their fears and needs. This inability or unwillingness is also linked to the child’s age and maturity” at 2).

⁵¹⁶ Black & Smith, *supra* note 430 at 339; For definition of a comparator group, see *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 [*Hodge*] (“The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter” at para. 23); See also part 3.1.5 on ‘Identifying a proper comparator group’ for a discussion on comparator group.

⁵¹⁷ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 58

⁵¹⁸ *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at paras. 86-91 [*Nova Scotia (Workers’ Compensation Board)*]

which has experienced historical disadvantage.⁵¹⁹ The Court's approach is in conformity with the purpose of section 15 of the Canadian Charter.⁵²⁰ Furthermore, the Supreme Court of Canada has stated that the enumerated and analogous grounds identify groups, which have been historically subjected to prejudice and stereotypes.⁵²¹ For this reason, regardless of the disadvantage in relation to the comparator group, when a claimant is classified to belong to a group that is generally disadvantaged in society, there is an indication of lack of proper concern, respect and consideration for that group.⁵²²

Accordingly, unaccompanied minors (equality claimants) and adult refugee claimants (the comparator group) are both disadvantaged groups, being refugee claimants. Disadvantage specifically experienced by unaccompanied minors with respect to the comparator group (i.e. adult refugee claimants) could assist the equality claimants (unaccompanied minors). However, the absence of such disadvantage would be a neutral factor if unaccompanied minors are members of a larger group that has experienced historical disadvantage. Regardless of the disadvantage in relation to the comparator group, the fact that unaccompanied minors, being equality claimants, belong to a group that is generally disadvantaged in society (children) indicates that there may have been a lack of appropriate concern, respect and consideration for unaccompanied minors, regardless of their disadvantage with respect to the group chosen as comparator. If part of the purpose of the section 15 of the Canadian Charter is to rectify disadvantage, a burden to prove subjective fear and objective fear for the 'well founded fear', like adults, has been disproportionately imposed on unaccompanied minors under section 96 of the *IRPA*, thereby, risking the denial of refugee protection accorded to them. Thus, disadvantage in this sense should provide support for an equality claim for unaccompanied minors seeking asylum in Canada.

From the wording of section 15(2) of the Canadian Charter and from the third contextual factor in *Law*,⁵²³ section 15 of the Canadian Charter will not be violated if

⁵¹⁹ *Ibid.*

⁵²⁰ Black & Smith, *supra* note 430 at 341

⁵²¹ *Corbiere*, *supra* note 471 at paras. 7-8

⁵²² Black & Smith, *supra* note 430 at 341

⁵²³ *Law*, *supra* note 399

laws, programs and activities ameliorate the conditions of disadvantaged individuals or groups even if such laws, programs and activities do not include the relatively advantaged groups.⁵²⁴ If a law were to reduce any amount of disparity between the advantaged and disadvantaged groups, this result is not discrimination against the advantaged group but it may be significant point to achieve equality.⁵²⁵ Applying this rationale accordingly, if section 96 of the *IRPA* were to eliminate subjective fear requirement for the ‘well-founded fear’ in the case of unaccompanied minors, this may be an essential part of achieving equality between unaccompanied minors (the disadvantaged group in consideration) and adult refugee claimants (relatively advantaged group comparing with unaccompanied minors) to reduce significant disparity between the two groups. In this context, section 96 of the *IRPA* would not violate section 15 of the Canadian Charter.

3.1.4.2 Relationship between grounds and claimant’s characteristics or circumstances

With regard to the second contextual factor, which is the relationship between grounds and a claimant’s characteristics or circumstances, the Supreme Court of Canada in *Law* stated that some of the enumerated and analogous grounds could “correspond with need, capacity, or circumstances”.⁵²⁶ The Court explained that one of the grounds is disability where to avoid discrimination requires distinctions be made so as to take into account the actual characteristics of disabled people.⁵²⁷ Similarly, the Court said that age is another ground where need, capacity, or circumstances may correspond with the ground.⁵²⁸ For this reason, the Court emphasized that legislation will be less likely to have negative effect on human dignity if it “takes into account the actual needs,

⁵²⁴ Black & Smith, *supra* note 430 at 342

⁵²⁵ *Ibid.*

⁵²⁶ *Law*, *supra* note 399 at paras. 69-71

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings”.⁵²⁹

Accordingly, requiring subjective and objective elements for the ‘well-founded fear’ in section 96 of the *IRPA* for unaccompanied minors, this legislation does not take into account their actual needs, capacity or circumstances.⁵³⁰ Therefore, section 96 of the *IRPA* is more likely to have a negative effect on human dignity. Considering the fact that the second contextual factor requires a duty to accommodate differences as an inherent part of the Canadian conception of equality,⁵³¹ and that this factor reflects some rectification of disadvantage,⁵³² section 96 of the *IRPA* has to take into account the particular situation of unaccompanied minors being vulnerable, children and without parental support, including their relative disadvantage to establish the traditional criteria of well-founded fear, which requires both subjective fear and objective fear. For instance, unaccompanied minors may unwittingly damage their case by trying to appear brave and minimizing the actual danger, and hence, putting their determination of refugee status at risk by failing to demonstrate their subjective fear.⁵³³

The second contextual factor can be called as the needs correspondence factor because it is referred as “the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others”.⁵³⁴ The correspondence factor appears to be the decisive factor to determine whether there is an impairment of human dignity.⁵³⁵ Even if other contextual

⁵²⁹ *Ibid.*

⁵³⁰ See Matthew Happold, “Excluding Children From Refugee Status: Child Soldiers and Article 1F of the Refugee Convention” (2001-2002) 17 Am. U. Int’l L. Rev. 1131 at 1145 (Children are more vulnerable and dependent than adults. Furthermore, children have developmental needs which adults do not have. Provisions of the Refugee Convention should be interpreted as far as possible in conformity with the principles set out in the *Convention on the Rights of the Child*.)

⁵³¹ Black & Smith, *supra* note 430 at 344

⁵³² Lavoie, *supra* note 493 at para. 43 (Bastarache J.)

⁵³³ Bueren, *supra* note 39 at 364

⁵³⁴ Law, *supra* note 399 at para. 88, point (9)(B)

⁵³⁵ Bruce Ryder, Cidalia C. Faria & Emily Lawrence, “What’s Law Good For: An Empirical Overview of Charter Equality Rights Decisions” (2004), 24 S.C.L.R. (2d) 103 at 122

factors point to other direction, it is the answer to the correspondence factor that most likely yields the outcome.⁵³⁶

Accordingly, presently, section 96 of the *IRPA* does not correspond to the needs, capacities and circumstances of unaccompanied minors because it does not provide a child sensitive criteria taking into account the vulnerability and/or immaturity due to age and the analogous ground of status of minors being unaccompanied. Unaccompanied minors, like adult refugee claimants have to prove subjective fear and objective fear in section 96 of the *IRPA*. However, unaccompanied minors, being children and refugees, who had undergone a trauma while leaving their country of origin, may not always be able to “verbalising their feelings” to adequately demonstrate the subjective element of their well-founded fear.⁵³⁷ Therefore, it can be argued that based on the needs correspondence factor, there is an impairment of human dignity of unaccompanied minors seeking asylum in Canada.

On the other hand, Levine and Penney argued that as late as 2002, the Supreme Court of Canada was internally conflicted about the significance of the needs correspondence factor in the section 15(1) of the Charter framework.⁵³⁸ For instance, in *Lavoie v. Canada*,⁵³⁹ Justice Bastarache, writing for the majority, placed little emphasis on the needs correspondence factor. However, Justice Arbour, in a minority opinion concurring in the result with Justice LeBel, expressly disagreed with the majority’s narrow characterization of the needs correspondence analysis.⁵⁴⁰

Levine and Penney argue that the Supreme Court of Canada has moved towards a more communitarian approach to equality rights under section 15 of the Canadian Charter.⁵⁴¹ They argue that the Supreme Court’s decisions in 2004 demonstrate that there is greater emphasis on the importance of the community to the individual and a corresponding movement away from the tradition liberal understanding of the person

⁵³⁶ Hogg, “What is Equality?”, *supra* note 440 at 59

⁵³⁷ Bueren, *supra* note 39 at 364

⁵³⁸ Roslyn J. Levine, Q.C. & Jonathon W. Penney, “The Evolving Approach to Section 15(1): Diminished Rights or Bolder Communities?” (2005) 29 S.C.L.R. (2d) 137 at 149

⁵³⁹ *Lavoie*, *supra* note 493

⁵⁴⁰ *Ibid.*

⁵⁴¹ Levine & Penney, *supra* note 538 at 148

based on a subjective and individualistic perspective.⁵⁴² They find that the needs correspondence factor provided the ‘hook’ for the Court in *Canadian Foundation*⁵⁴³ case to apply a communitarian approach to the section 15 analysis.⁵⁴⁴

The Chief Justice in *Canadian Foundation* case explored the various needs of children, stating that as vulnerable members of Canadian society, children need to be protected from abusive treatment and that Parliament and the Executive act admirably to shield children from psychological and physical harm, and that “government responds to the critical need of all children for a safe environment”.⁵⁴⁵ However, the Chief Justice also noted other needs of children particularly that they depend on parents and teachers for guidance and discipline.⁵⁴⁶ For these reasons, the majority of the Court found that section 43 of the Criminal Code was a reasonable attempt by Parliament to accommodate these needs of children.⁵⁴⁷ In this case, by allowing parents and teachers to carry out the reasonable education and guidance that are essential to children’s development without fear of sanction by the criminal law, section 43 of the Criminal Code corresponds to these circumstances.⁵⁴⁸ Here, the needs correspondence factor supported the finding of the majority that section 43 of the Criminal Code was not an affront to children’s dignity within the meaning of section 15(1) of the Canadian Charter.⁵⁴⁹ In this context, the majority of the Court’s approach to the needs of children in *Canadian Foundation* Case is clearly communitarian.⁵⁵⁰

Taking into account the needs of unaccompanied minors seeking asylum in Canada, even their communitarian approach in *Canadian Foundation* could be used to support the finding that section 96 of the *IRPA* is an affront to unaccompanied children’s dignity within the meaning of section 15(1) of the Canadian Charter. This is

⁵⁴² *Ibid.*

⁵⁴³ *Canadian Foundation*, *supra* note 424

⁵⁴⁴ Levine & Penney, *supra* note 538 at 149

⁵⁴⁵ *Canadian Foundation*, *supra* note 424 at para. 58

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.* at para. 59

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.* at para. 68

⁵⁵⁰ Levine & Penney, *supra* note 538 at 149

because Canadian government must respond to the critical needs of all children, including unaccompanied minors seeking asylum in Canada, for a safe environment. Furthermore, Parliament and the Executive should act to shield them from psychological and physical harm because unaccompanied minors are vulnerable members of Canadian society. Children's status of being unaccompanied minors requires special consideration because children depend on parents for guidance and support. Being unaccompanied add to their vulnerability and/or immaturity. Therefore, considering the plight of unaccompanied minors in the Canadian community, the needs correspondence factor should provide a 'hook' to apply a communitarian approach to the section 15 analysis in their case, finding section 96 of the *IRPA* infringing section 15 of the Charter because section 96 of the *IRPA* does not correspond to the needs and circumstances of unaccompanied minors seeking asylum in the Canadian community, but require them to establish traditional criteria of well-founded fear, like adult refugee claimants.

3.1.4.3 Ameliorative Purpose or Effects

The third contextual factor, which is the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society, suggests that section 15 of the Canadian Charter is not violated if the challenged law or activity reduces the disparity between a disadvantaged individual or group and a more advantaged counterpart.⁵⁵¹ This factor supports the idea that reducing disadvantage is the central purpose of section 15 of the Canadian Charter.⁵⁵²

At present, section 96 of the *IRPA* does not reduce disparity between any disadvantage individual or group and a more advantaged counterpart. Section 96 is not designed to ameliorate the condition of another more disadvantaged group. Furthermore, as noted by the Supreme Court of Canada,⁵⁵³ it is not necessary that all of the contextual factors are applicable in every case to determine if there is discrimination.

⁵⁵¹ Black & Smith, *supra* note 430 at 350

⁵⁵² Law, *supra* note 399 at para. 72

⁵⁵³ *Ibid.* at para. 62-75

There is substantial overlap between the second and third contextual factors set out in *Law*.⁵⁵⁴ Differential treatment corresponding with the needs, capacity, and circumstances of the equality claimant is more likely to have ameliorative purpose or effect.⁵⁵⁵ Therefore, the Court will usually find that differential treatment has an ameliorative effect, if the Court were to find a correspondence between the grounds and differential treatment that takes into account the needs, capacity, and circumstances of the equality claimant.⁵⁵⁶ Likewise, at present, ‘non-differential treatment’, having subjective and objective fear requirement for the well-founded fear in section 96 of the *IRPA*, regardless of age and unaccompanied status of minors seeking asylum, does not correspond with the needs, capacity and circumstances of unaccompanied minors. Consequently, such ‘non-differential treatment’ for asylum seeking unaccompanied minors in section 96 of the *IRPA* does not have any ameliorative purpose or effect.

3.1.4.4 Nature of the Interest Affected

The fourth contextual factor embraced in *Law*⁵⁵⁷ is the nature and scope of the interest affected by the impugned law. Justice Iacobucci stated that the severity of the effect and the degree to which it is localized have to be determined, taking into account their constitutional and social importance and economic consequences. Here, he is adopting the words of Justice L’Heureux-Dubé who had highlighted in *Egan*⁵⁵⁸ that “if all other things are equal, the more severe and localized the...consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory” under section 15 of the Canadian Charter. Justice Iacobucci said that “the discriminatory calibre of differential treatment cannot be fully appreciated” without assessing the economic, constitutional and societal significance ascribed “to the interest

⁵⁵⁴ *Ibid.*; Jessie Givner, “Child Poverty and Social Assistance: *Gosselin v. Quebec (Attorney General)*” (2005) 24 C.F.L.Q. 105

⁵⁵⁵ Givner, *ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Law*, *supra* note 399 at para. 88

⁵⁵⁸ *Egan*, *supra* note 421 at para. 63

or interests adversely affected by the legislation in question”.⁵⁵⁹ He added that it is essential to consider whether the distinction constitutes a complete non-recognition of a particular group.⁵⁶⁰ Examples of significant interests recognized by the Supreme Court of Canada are employment,⁵⁶¹ eligibility to exercise the franchise⁵⁶² and physical integrity.⁵⁶³

Accordingly, in order to claim equality rights under section 15 of the Canadian Charter for unaccompanied minors seeking asylum, the nature of the interest affected by section 96 of the *IRPA* is the eligibility to benefit refugee protection.⁵⁶⁴

Furthermore, as noted by Justice L’Heureux-Dubé, “thinking about equality involves much more than just analyzing discrimination claims”.⁵⁶⁵ She added that “thinking about equality requires understanding of the historical disadvantages experienced by members of some groups, an awareness of groups’ differences and unique experiences, and a sensitivity...that much of the law has been designed from the perspective, and in the interests, of those with power and privilege”.⁵⁶⁶ Equality, although being a comparative concept, does not always require treatment of people in the same way but requires recognizing and respecting these differences and treating

⁵⁵⁹ *Law*, *supra* note 399 at para. 74

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Nova Scotia (Workers’ Compensation Board)*, *supra* note 518 at para. 104; *Lavoie*, *supra* note 493 at para. 45

⁵⁶² *Corbiere*, *supra* note 471 at para. 17

⁵⁶³ *Canadian Foundation*, *supra* note 424 at para. 56

⁵⁶⁴ Unaccompanied minors’ success in refugee determination hearings is at stake if their needs, capacity and circumstances are not considered to understand that they might not be able to express their subjective fear adequately as compared to adult refugee claimants. Hence, children’s life and safety is at risk if the traditional criteria of well-founded fear is applied equally to adult refugee claimants and unaccompanied minors. For instance, see Citizenship and Immigration Canada, *PPI: Processing Claims for Refugee Protection in Canada*, *supra* note 11, where it is recognized by the Citizenship and Immigration of Canada in their policy manual to immigration officers that “[c]hildren’s needs differ from those of adults; [c]hildren manifest fears differently than adults; [c]hildren may not be able to articulate their fears in the same way as adults; [c]hildren may not present their claims for refugee protection in the same way as adults would” at 60. Nevertheless, section 96 of the *IRPA* still requires both subjective fear and objective fear for unaccompanied minors to benefit refugee protection.

⁵⁶⁵ The Honourable Claire L’Heureux-Dubé, “The Legacy of the “Persons Case”: Cultivating the Living Tree’s Equality Leaves” (2000) 63 Sask. L. Rev. 389 at 399 [L’Heureux-Dubé, “The Legacy”]

⁵⁶⁶ *Ibid.*

them accordingly.⁵⁶⁷ Therefore, the more severe the consequences,⁵⁶⁸ the more likely that the failure to make a distinction⁵⁶⁹ is discriminatory under section 15 of the Canadian Charter.⁵⁷⁰ Here, the failure to make a distinction in section 96 of the *IRPA* is discriminatory because this failure is responsible for the consequence of denial of refugee protection to unaccompanied minors seeking asylum in Canada, putting their life and safety at risk. Furthermore, in this context, the failure to make a distinction constitutes a complete non-recognition of unaccompanied minors.

Therefore, section 96 of the *IRPA* violates the right to equality of unaccompanied minors seeking asylum in Canada under section 15 of the Canadian Charter, by failing to make a distinction based on enumerated ground of age and on analogous ground of unaccompanied status to eliminate the subjective element requirement for the ‘well-founded fear’ for these minors. Rather, section 96 of the *IRPA*⁵⁷¹ discriminates unaccompanied minors by requiring them to demonstrate both subjective fear and objective fear.⁵⁷²

3.1.5 Identifying Proper Comparator Group

In *Eldridge v. British Columbia (Attorney General)*,⁵⁷³ the Supreme Court of Canada had stated that “Section 15(1), the Court [in *Andrews*] held, was intended to ensure a measure of substantive, and not merely formal equality”. By recognizing in *Andrews* that “identical treatment may frequently produce serious inequality”,⁵⁷⁴ the

⁵⁶⁷ *Ibid.* at 395

⁵⁶⁸ For example, a severe consequence will be denial of refugee protection through the application of traditional criteria of well-founded fear on unaccompanied minors seeking asylum in Canada.

⁵⁶⁹ For example, a failure to make a distinction based on age and on the unaccompanied status of minors to eliminate subjective element for the ‘well-founded fear’.

⁵⁷⁰ See *Egan*, *supra* note 421 at para. 63. (The language of Justice L’Heureux-Dubé is applied here to show that a failure to make a distinction is also discriminatory.)

⁵⁷¹ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27).

⁵⁷² See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5)

⁵⁷³ *Eldridge*, *supra* note 460 at para. 61

⁵⁷⁴ *Andrews*, *supra* note 398

Court had recognized the significance of taking difference into consideration. This implies the essence of substantive equality.⁵⁷⁵ However, to realize substantive equality, comparator groups have to be identified to take differences into account⁵⁷⁶ because the Supreme Court of Canada has also characterized equality as “a comparative concept” and that “every difference in treatment between individuals under the law will not necessarily result in inequality”.⁵⁷⁷

Although Justice Binnie, in *Hodge v. Canada (Minister of Human Resources Development)*, restated (citing *Andrews*) that “[t]he objective of s. 15(1) is not just ‘formal’ equality but *substantive* equality”, his comparator group analysis does not justify his claim because

[t]he appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter.⁵⁷⁸

Professor Dianne Pothier argues that the ‘mirror’ language used by the Court reveals a mind set of focus on formal equality and the requirement for direct parallels, obscuring different needs and circumstances that have to be considered to attain substantive equality.⁵⁷⁹

On the other hand, Justice Binnie had stated that it is “crucial” to have properly characterized identification of comparator groups.⁵⁸⁰ In *Hodge*,⁵⁸¹ the Court had affirmed that “a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis”.

In order to demonstrate violation of their equality rights under section 15 of the Canadian Charter to prevent identical treatment for unaccompanied minors and adult refugee claimants, whereby each has to establish the same criteria of well founded fear,

⁵⁷⁵ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 82 [*Vriend*]

⁵⁷⁶ Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All?” (2006) 33 S.C.L.R. (2d) 135 at 142

⁵⁷⁷ *Andrews*, *supra* note 398 at 164

⁵⁷⁸ *Hodge*, *supra* note 516 at paras. 23 and 25

⁵⁷⁹ Pothier, *supra* note 576 at 145

⁵⁸⁰ *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 45

⁵⁸¹ *Hodge*, *supra* note 516 at para. 18

unaccompanied minors have to identify the proper comparator group. Applying the “mirror” language of a comparator group⁵⁸² would mean that the comparator group (adult refugee claimants group) “mirrors” the characteristics of unaccompanied minors group relevant to the benefit or advantage sought (establishing the criteria of well-founded fear to benefit refugee protection) except that the statutory definition (section 96 of the *IRPA*⁵⁸³) includes a personal characteristic (like age) that is offensive to the Canadian Charter or omits a personal characteristic in a way that is offensive to the Charter. From this “mirror” language, in order to qualify ‘adult refugee claimants group’ as a proper comparator group, the characteristics of unaccompanied minors must be directly parallel to those of adult refugee claimants and that omitting age in section 96 of the *IRPA* would be offensive to the Charter. Here, the use of ‘mirror’ language would focus on formal equality rather than substantive equality for unaccompanied minors because the requirements for direct parallels obscure different needs and circumstances of unaccompanied minors.

Although unaccompanied minors and adult refugee claimants share the same characteristic of being refugee claimants, there are certain characteristics such as child lacking parental support, vulnerability and immaturity due to age that are particular to unaccompanied minors. For these reasons, adult refugee claimants could be rejected by the courts as a proper comparator group for the analysis of section 15 of the Canadian Charter.⁵⁸⁴ Hence, this could lead to a misidentification of a proper comparator group and can doom the outcome of the analysis of this section for unaccompanied minors. Therefore, such a failure to identify a proper comparator group could undermine substantive equality for unaccompanied minors seeking asylum in Canada.

On the other hand, in *Law*,⁵⁸⁵ to identify the appropriate comparator, Justice Iacobucci advanced to consider a variety of factors, such as subject-matter, purpose and the effect of the legislation, whether the legislation effects discrimination in a substantive sense, other contextual factors, biological, historical and sociological

⁵⁸² See *ibid.* at para. 23

⁵⁸³ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

⁵⁸⁴ Although this is not a real concern in Canada, the idea here is to show the importance of identifying proper comparator group.

⁵⁸⁵ *Law*, *supra* note 399 at para. 57

similarities or dissimilarities. Accordingly, applying this, adult asylum seekers in Canada can be identified as the proper comparator group for unaccompanied minors' claim of equality rights because section 96 of the *IRPA* effects discrimination in a substantive sense by failing to take into account the vulnerability and/or immaturity of unaccompanied minors due to their age but requiring these minors to establish both subjective fear and objective fear, like adults, for the 'well-founded fear', thereby risking a denial of refugee protection accorded to these minors.⁵⁸⁶

However, Professor Margot Young cautioned that "[e]quality law has difficulty to deal the inequality of those most marginalized and most neglected in our society" because the further an individual or group sits from what is known as the "norm", the more the inequality that is complained of will appear as idiosyncratic, not being apiece with the broader patterns of social exclusion.⁵⁸⁷ In this manner, there would be no comparator group available to secure the equality analysis.⁵⁸⁸ Professor Young warns that it will be least likely that the most marginalized, the most "different" will find a comparator group against whom their equality harms will show up because when the equality claimant is further away from the mainstream, the privileged norm, it has been difficult for the Court to see that the fault for inequality lies in the norm and not in the different individual.⁵⁸⁹

To sum up, the Supreme Court of Canada had characterized equality as "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."⁵⁹⁰ Although the comparative nature of an equality analysis could advance rights, the identification of comparator groups can present barriers to the

⁵⁸⁶ Furthermore, section 96 of the *IRPA* has to take into account the status of minors being unaccompanied, given that children are dependent on their parents. In addition, the biological and historical dissimilarities of unaccompanied minors when compared to adult asylum seekers could also be relevant to establish the latter as the proper comparator group. Therefore, identifying proper comparator group could promote substantive equality for unaccompanied minors seeking asylum in Canada.

⁵⁸⁷ Margot Young, "Blissed Out: Section 15 at Twenty" (2006) 33 S.C.L.R. (2d) 45 at 63

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.* at 63-64

⁵⁹⁰ *Andrews, supra* note 398 at 164

advancement of rights if it is done in a formalistic manner.⁵⁹¹ This is because substantive equality cannot be advanced through formalistic comparisons, although the use of formalistic comparison has become the current trend.⁵⁹² Identifying proper comparator group could promote substantive equality for unaccompanied minors seeking asylum in Canada. Adult asylum seekers in Canada can be identified as the proper comparator group for unaccompanied minors' claim of equality rights because section 96 of the *IRPA* effects discrimination in a substantive sense by failing to take into account the vulnerability and/or immaturity of unaccompanied minors due to their age but requiring these minors to establish both subjective fear and objective fear, like adults, for the 'well-founded fear', thereby risking a denial of refugee protection accorded to these minors. If identification of comparator group is done in a formalist way, adult refugee claimants could be rejected by the courts as a proper comparator group for the analysis of section 15 of the Canadian Charter, leading to a misidentification of a proper comparator group and dooming the outcome of the analysis of section 15 for unaccompanied minors. Therefore, any such failure to identify a proper comparator group could undermine substantive equality for unaccompanied minors seeking asylum in Canada.

3.2 Violation is 'prescribed by law'

It was shown that section 96 of the *IRPA* violates the right to equality of unaccompanied minors seeking asylum in Canada under section 15 of the Canadian Charter, by failing to make a distinction based on the enumerated ground of age and the analogous ground of unaccompanied status to eliminate the subjective element requirement for the 'well-founded fear' for these minors. Rather, section 96 of the *IRPA*⁵⁹³ discriminates unaccompanied minors by requiring them to demonstrate both

⁵⁹¹ Pothier, *supra* note 576 at 150

⁵⁹² *Ibid.* at 150

⁵⁹³ See *Jarada*, *supra* note 63 ("There are subjective and objective components to section 96 [of the *IRPA*]" at para. 27)

subjective fear and objective fear in order to establish their ‘well-founded fear’.⁵⁹⁴ This was demonstrated fully in part 3.1.

Here, in part 3.2, it will be shown whether the limit of imposing ‘subjective fear and objective fear’ on unaccompanied minors to establish their ‘well-founded fear’ in section 96 of the *IRPA* is ‘prescribed by law’ within the meaning of section 1 of the Charter.⁵⁹⁵ The need to apply section 1 of the Canadian Charter to justify violation of section 15 of the Charter will also be discussed.

Section 1 of the Canadian Charter states that “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁵⁹⁶ This means that the right to equality guaranteed by section 15 of the Canadian Charter is subject to ‘reasonable limits prescribed by law’. In other words, any violation of the equality right under section 15 of the Canadian Charter must be ‘prescribed by law’ and it must be ‘reasonable’. If section 96 of the *IRPA*⁵⁹⁷ discriminates unaccompanied minors by requiring them to demonstrate both subjective fear and objective fear in order to establish their ‘well-founded fear’,⁵⁹⁸ then the limit of imposing ‘subjective fear and objective fear’ for the ‘well-founded fear’ on unaccompanied minors must be ‘prescribed by law’.

Consequently, a question arises whether judicial interpretation of the term ‘well-founded fear’ contained in section 96 of the *IRPA* qualifies as ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter. Section 96 of the *IRPA* states as follows:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

⁵⁹⁴ See *Yusuf*, *supra* note 202 (Justice Hugessen held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5.)

⁵⁹⁵ *Charter*, *supra* note 58, s. 1

⁵⁹⁶ *Ibid.*

⁵⁹⁷ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27)

⁵⁹⁸ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5)

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.⁵⁹⁹

To explain ‘well-founded fear’ in section 96 of the *IRPA*, the Federal Court stated that “there are subjective and objective components to section 96 [of the *IRPA*].⁶⁰⁰ The term “well-founded fear” as found in the definition of a Convention refugee has two elements, the subjective fear of persecution felt by the applicant and the objective element (objective fear).⁶⁰¹ This means that unaccompanied minors, like adult refugee claimants, have to demonstrate their subjective fear and objective fear in order to establish their well-founded fear so as to benefit refugee protection.⁶⁰² The interpretation of the term ‘well-founded fear’ as requiring subjective fear and objective fear is expressly provided by the courts and not by the statute (i.e. section 96 of the *IRPA*).⁶⁰³ Therefore, a question arises whether the judicial interpretation of the term ‘well-founded fear’ for the requirement of subjective fear and objective fear in section 96 of the *IRPA* qualifies as ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter.

Whether judicial interpretation of the term ‘well-founded fear’ qualifies as ‘prescribed by law’ is important to be resolved because if judicial interpretation of a term in a statute is qualified as ‘prescribed by law’, then section 1 of the Canadian Charter has to be applied for violations of Charter rights in order to justify these violations under section 1 of the Charter. This is because rights and freedoms generated under the Canadian Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁶⁰⁴ On the contrary, if judicial interpretation of a term in a statute is not qualified as ‘prescribed by

⁵⁹⁹ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

⁶⁰⁰ *Jarada*, *supra* note 63 at para. 27

⁶⁰¹ *Begollari*, *supra* note 74 at para. 18

⁶⁰² Jones & Baglay, *supra* note 31 at 112 (Although leading scholars, like James C. Hathaway, have questioned the requirement of subjective fear in the Refugee definition, however, the jurisprudence has required both subjective fear and objective fear for all refugee claimants). For a critique of the requirement of subjective fear, see Hathaway & Hicks, *supra* note 31

⁶⁰³ See *Rajudeen*, *supra* note 73 at 134; See *Ward*, *supra* note 31 at para. 47; See *Jarada*, *supra* note 63 at para. 27; See *Begollari*, *supra* note 74 at para. 18

⁶⁰⁴ *Charter*, *supra* note 58, s. 1

law’, then a violation of Charter rights cannot be justified under section 1 of the Canadian Charter.

The courts are not clear as to whether the judicial interpretation of the term ‘well-founded fear’ in section 96 of the *IRPA* can be qualified as ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter. The Supreme Court of Canada has not yet essayed a comprehensive analysis of “prescribed by law”.⁶⁰⁵

The term ‘well-founded fear’ in section 96 of the *IRPA* is ambiguous because according to case law, this term requires ‘objective fear and subjective fear’ for all refugee claimants⁶⁰⁶ but it does not take into account that unaccompanied minors may be incapable to demonstrate their subjective fear due to their age, immaturity and special vulnerability.⁶⁰⁷ According to the UNHCR, “[i]f there is reason to believe that the parents wish their child to be outside the country of origin on grounds of their own well-founded fear of persecution, the child him/herself may be presumed to have such a fear.”⁶⁰⁸ This implies that unaccompanied minors may be incapable to manifest their own well-founded fear. In addition, the UNHCR has also indicated that “[i]f the will of

⁶⁰⁵ See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Thomson Canada Limited, 2007) at 38-12 and 38-13 (Two requirements have been held to be inherent in the phrase “prescribed by law” by the European Court of Human Rights, interpreting the same phrase in the European Convention on Human Rights. First, the law must be adequately accessible to the public. Second, the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law. Although, the Supreme Court of Canada has not yet essayed a comprehensive analysis of “prescribed by law”, the decisions are consistent with the two requirements of accessibility and precision. For accessibility, the Court has held that a statute, a regulation or a rule of the common law will qualify. As for precision, the Court has held that a limit on a right need not be express, but can result “by necessity from the terms of a statute or regulation or from its operating requirements”).

⁶⁰⁶ See *Rajudeen*, *supra* note 73 at 134; See *Ward*, *supra* note 31 at para. 47; See *Jarada*, *supra* note 63 at para. 27; See *Begollari*, *supra* note 74 at para. 18

⁶⁰⁷ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5); See IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12 (“A child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant” at 5 or n.27); See UNHCR, *Refugee Children: Guidelines*, *supra* note 42 (A child may not be mature enough to establish a well-founded fear of persecution in the same way as an adult at 100-101); See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 (“Children may manifest their fears in ways different from adults. Therefore, in the examination of their claims, it may be necessary to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution” at 12-13).

⁶⁰⁸ UNHCR, *Handbook*, *supra* note 41 at para. 218

the parents cannot be ascertained or if such will is in doubt, then a decision will have to be made regarding the well-foundedness of the child's fear on the basis of all known circumstances."⁶⁰⁹ This implies that the 'well-founded fear' of an unaccompanied minor does not require an examination of his or her emotional reaction (i.e. subjective fear). Rather, a minor's well-founded fear could be assessed on the basis of all known circumstances, which imply objective fear. Therefore, 'well-founded fear' in section 96 of the *IRPA* is ambiguous whether it should require both subjective fear and objective fear for unaccompanied minors, given that minors are unable to demonstrate their subjective fear.

According to presumption of constitutionality,⁶¹⁰ which "is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution"⁶¹¹, an ambiguous text should be interpreted in conformity with the Charter. The term 'well-founded fear' in section 96 of the *IRPA* should be interpreted in conformity with the Charter, given that section 96 of the *IRPA*⁶¹² discriminates unaccompanied minors under section 15 of the Canadian Charter by requiring them to demonstrate both subjective fear and objective fear in order to establish their 'well-founded fear'.⁶¹³

There is a "presumption that Parliament intended to enact legislation in conformity with the Charter...If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted".⁶¹⁴ Precisely, presumption of constitutionality carries one of the legal consequences as follows:

⁶⁰⁹ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at 13

⁶¹⁰ Joseph Eliot Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 8th ed. (Edmonton: Juriliber Limited, 2001) at Part V, Chapter 2 (B), Research Note: The Presumption of Constitutionality ("A majority of the Supreme Court has seen the role of the presumption of constitutionality as limited to cases where there is a textual ambiguity to be resolved.")

⁶¹¹ *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers*, Loc. 832 (1987), 38 D.L.R. (4th) 321 at 331

⁶¹² See *Jarada*, *supra* note 63 ("There are subjective and objective components to section 96 [of the *IRPA*]" at para. 27).

⁶¹³ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is "incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms" at para. 5).

⁶¹⁴ *Sharpe*, *supra* note 69 at para. 33 (McLachlin C.J.)

[W]here a law is open to two interpretations, under one of which it would be unconstitutional, and under the other of which it would be constitutional, the latter interpretation is the one that should be selected; this mode of interpretation is known as “reading down”.⁶¹⁵

Two interpretations are possible for the term ‘well-founded fear’ in section 96 of the *IRPA*: first, following the case law, the term requires ‘objective fear and subjective fear’ for all refugee claimants;⁶¹⁶ and second, the term can be interpreted to require objective fear and subjective fear for all refugee claimants except objective fear only for unaccompanied minors. The first interpretation will violate the Charter, whereas the second interpretation will not violate the Charter. It can be argued that the current judicial interpretation of the term ‘well-founded fear’⁶¹⁷ in section 96 of the *IRPA* is wrong because this interpretation violates section 15 of the Canadian Charter by requiring unaccompanied minors to demonstrate their subjective fear and objective fear.⁶¹⁸

Therefore, the term “well-founded fear” in section 96 of the *IRPA* should be read to consist of objective fear and subjective fear for all refugee claimants except objective fear only for unaccompanied minors seeking asylum in Canada. This reading would ensure minors’ right to equality under section 15 of the Canadian Charter is not violated by requiring them to demonstrate their subjective fear. Such a reading will conform to the presumption of constitutionality.

The limit of imposing ‘subjective fear and objective fear’ on unaccompanied minors to establish their well-founded fear must be ‘prescribed by law’ in order to see if the violation of section 15 of the Canadian Charter can be upheld by applying section 1 of the Canadian Charter. In *R. v. Thomsen*,⁶¹⁹ Justice Le Dain referred to *R. v. Therens*⁶²⁰

⁶¹⁵ Hogg, *Constitutional Law of Canada*, *supra* note 605 at 38-10

⁶¹⁶ See *Rajudeen*, *supra* note 73 at 134; See *Ward*, *supra* note 31 at para. 47; See *Jarada*, *supra* note 63 at para. 27; See *Begollari*, *supra* note 74 at para. 18

⁶¹⁷ Currently, well-founded fear requires ‘objective fear and subjective fear’ for all refugee claimants. See *Rajudeen*, *ibid.*; See *Ward*, *supra* note 31 at para. 47; See *Jarada*, *supra* note 63 at para. 27; See *Begollari*, *supra* note 74 at para. 18

⁶¹⁸ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5).

⁶¹⁹ *R. v. Thomsen*, [1988] 1 S.C.R. 640 at para. 15

⁶²⁰ *R. v. Therens*, [1985] 1 S.C.R. 613 at 645 at para. 56 (Le Dain J.)

and explained what he understood to be a limit prescribed by law within the meaning of section 1 of the Canadian Charter. He stated that

[t]he limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.⁶²¹

The limit of imposing ‘subjective fear and objective fear’ on unaccompanied minors to demonstrate their ‘well-founded fear’ is not expressly provided in section 96 of the *IRPA* but expressly provided by the courts.⁶²²

It could be argued that the requirement of subjective fear and objective fear results by necessary implication from the terms of a statute (i.e. from the term ‘well-founded fear’ in section 96 of the *IRPA*) or from its operating requirements. For instance, with regard to subjective fear: 1) the requirement of subjective fear can be traced from the interpretation of the word “fear” in the definition of Convention refugee;⁶²³ 2) the act of making a refugee claim is an expression of subjective fear;⁶²⁴ 3) likewise, the direct testimony of a refugee claimant that she fears returning to her home country is *prima facie* proof of subjective fear⁶²⁵ and 4) the requirement of subjective fear must be satisfied at the moment of a refugee determination hearing.⁶²⁶

The crucial requirement for refugee status is whether the refugee claimant has a “well-founded fear of persecution”.⁶²⁷ The claimant may subjectively fear persecution if he is returned to his homeland but his fear must be assessed objectively, in light of the situation in the claimant’s country of nationality, to determine if there is a foundation for it.⁶²⁸ Citing *Ward*,⁶²⁹ the Federal Court of Canada said that “[i]t is clear that a well-

⁶²¹ *Ibid.* See also *R. v. Swain*, [1991] 1 S.C.R. 933 at para. 29

⁶²² See *Rajudeen*, *supra* note 73 at 134; See *Ward*, *supra* note 31 at para. 47; See *Jarada*, *supra* note 63 at para. 27; See *Begollari*, *supra* note 74 at para. 18

⁶²³ *Jones & Baglay*, *supra* note 31 at 112

⁶²⁴ *Ibid.*

⁶²⁵ *Parada*, *supra* note 31; *Hatami*, *supra* note 31 at para. 25.

⁶²⁶ *Jones & Baglay*, *supra* note 31 at 113

⁶²⁷ *Kwiatkowsky v. Canada (Minister of Employment and Immigration)*, [1982] 2 S.C.R. 856 [Kwiatkowsky]

⁶²⁸ *Ibid.*

⁶²⁹ *Ward*, *supra* note 31 at para. 64

founded fear requires both a subjective fear and an objective fear”.⁶³⁰ Likewise, the UNHCR explains that

[t]o the element of fear – a state of mind and a subjective condition – is added the qualification “well-founded”. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element and in determining whether well-founded fear exists, both elements must be taken into consideration.⁶³¹

The UNHCR’ position is an expression of traditional doctrine which understands fear as a subjective element.⁶³² Fear relates to the state of mind and to this subjective element, the objective qualification “well-founded” is added.⁶³³

Therefore, on one hand, it can be argued that the requirement of subjective fear and objective fear results by necessary implication from the term ‘well-founded fear’ in section 96 of the *IRPA* or from its operating requirements. Consequently, this means the limit of imposing subjective fear and objective fear on unaccompanied minors is ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter. In other words, the judicial interpretation of the term ‘well-founded fear’ in section 96 of the *IRPA* can be qualified as ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter.

On the other hand, it can be argued that the requirement of subjective fear and objective fear does not result by necessary implication from the term ‘well-founded fear’ in section 96 of the *IRPA* or from its operating requirements in the case of asylum seeking unaccompanied minors. This is because it is illogical to require minors to establish their subjective fear knowing their incapability to do so due to their age. For instance, it is recognized by the CIC in their policy manual to immigration officers that “[c]hildren’s needs differ from those of adults; [c]hildren manifest fears differently than adults; [c]hildren may not be able to articulate their fears in the same way as adults; [c]hildren may not present their claims for refugee protection in the same way as adults

⁶³⁰ *Molina v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 289 at para. 25

⁶³¹ UNHCR, *Handbook*, *supra* note 41 at para. 38

⁶³² Niraj Nathwani, *Rethinking Refugee Law* (The Hague: Kluwer Law International, 2003) at 106

⁶³³ *Ibid.*

would”.⁶³⁴ The incapability of children to experience subjective fear is also recognized by the Federal Court of Appeal in *Yusuf*.⁶³⁵ Refugee law should be understood as an expression of the principle that the law may not demand the impossible⁶³⁶ especially from children. Thus, the requirement of subjective fear and objective fear does not result by necessary implication from the term of ‘well-founded fear’ in section 96 of the *IRPA* or from its operating requirements in the case of asylum seeking unaccompanied minors.

Consequently, the limit of imposing subjective fear and objective fear on unaccompanied minors cannot be ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter. To put it differently, the judicial interpretation of the term ‘well-founded fear’ in section 96 of the *IRPA* cannot be qualified as ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter. Therefore, a violation of Charter rights cannot be justified under section 1 of the Canadian Charter.

Generally speaking, for the purpose of the application of section 1 of the Canadian Charter, it could be assumed that judicial interpretation of a term in a statute is the logical extension of the statute and therefore, it is ‘law’ for the purpose of the Charter. For this reason, judicial interpretation of the term ‘well-founded fear’ in section 96 of the *IRPA* can be qualified as ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter.

Given that section 96 of the *IRPA*⁶³⁷ discriminates unaccompanied minors under section 15 of the Canadian Charter by requiring them to demonstrate both subjective fear and objective fear in order to establish their ‘well-founded fear’⁶³⁸ and assuming that the limit of imposing subjective fear and objective fear is ‘prescribed by law’ within

⁶³⁴ Citizenship and Immigration Canada, *PPI: Processing Claims for Refugee Protection in Canada*, *supra* note 11; See also UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 (“Children may manifest their fears in ways different from adults. Therefore, in the examination of their claims, it may be necessary to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution” at 12 and 13).

⁶³⁵ *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5).

⁶³⁶ Nathwani, *supra* note 632 at 109

⁶³⁷ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27)

⁶³⁸ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5).

the meaning of section 1 of the Canadian Charter, it will be shown, in part 3.4, that the violation of equality right of unaccompanied minors cannot be upheld under section 1 of the Charter.

Briefly, in the following part, the blurring between the analysis of section 1 and section 15 of the Canadian Charter will be discussed first, demonstrating why section 1 of Charter need not be applied to save violation of section 15 of the Charter.

3.3 Blurring between analyses

It can be argued that section 1 of the Canadian Charter need not be applied to save violation of section 15 of the Charter because the blurring between the analysis of section 1 and section 15 leaves no meaningful role to section 1.

The contextual factors, especially the second and fourth contextual factors, set out in *Law*⁶³⁹ can operate to blur the line between the analysis under section 1 and section 15 of the Charter⁶⁴⁰ such that there is no meaningful role for section 1 of the Charter to justify violations of section 15. For instance, Peter Hogg, to explain the real meaning of the correspondence factor (the second contextual factor), suggested that “the correspondence test, as it has been applied by the Court, comes down to an assessment by the Court of the legitimacy of the statutory purpose and the reasonableness of using a listed or analogous ground to accomplish that purpose”, thus, leaving little role for section 1 of the Charter.⁶⁴¹ In *Gosselin*,⁶⁴² Justice Bastarache, in his dissenting opinion, pointed that the application of the second contextual factor imported section 1 considerations into section 15, thus shifting the onus concerning these considerations from the government to the equality claimant. Justice Binnie, dissenting in part, in

⁶³⁹ *Law*, *supra* note 399

⁶⁴⁰ Black & Smith, *supra* note 430 at 354; See D. Proulx, “Les droits à l’égalité revus et corrigés par la Cour suprême du Canada dans l’arrêt *Law* : un pas en avant ou un pas en arrière ?” (2001) 61 R. du B. 186 at 256-257 discussing the tendency in some cases to incorporate into the discussion of the second contextual factor matters that, in his view, would be more appropriately come within section 1 of the Charter.

⁶⁴¹ Hogg, “What is Equality?”, *supra* note 440 at 59

⁶⁴² *Gosselin*, *supra* note 467 at paras. 242-244

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)),⁶⁴³ pointed that the second contextual factor, which is the factor of “correspondence”, presents special difficulty because of its potential overlap with section 1. To describe it, he quoted Iacobucci J. in *Law* that “...it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant’s actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant’s needs, capacities, and circumstances”.⁶⁴⁴

In addition, Sheila McIntyre highlighted that three of the four contextual factors have served to import elements of the *Oakes*⁶⁴⁵ analysis into section 15, resulting in a blurring of section 15 and section 1 as well as confusing and compromising the equality claimant’s burden of proof.⁶⁴⁶ Under section 1 of the Charter, the government bears the onus to establish the objectives of the impugned law and that those objectives are pressing and important. Sheila McIntyre pointed that it is a misapplication of the *Law*⁶⁴⁷ framework to assess reasonableness of a law’s purpose and design at the section 15 stage.⁶⁴⁸ At section 15 stage, the equality claimant’s burden of proof is increased including “leaving unclear the nature and content of the claimant’s evidentiary burden”.⁶⁴⁹ Moreover, the government’s burden of proof is relaxed at section 15 stage.⁶⁵⁰ Similarly, Debra McAllister pointed that the *Law*⁶⁵¹ test incorporates elements of the section 1 justification analysis, which effectively imposes a higher burden of

⁶⁴³ *Canadian Foundation*, *supra* note 424 at para. 93

⁶⁴⁴ *Law*, *supra* note 399 at para. 70

⁶⁴⁵ The test to be applied to determine whether a violation can be justified under section 1 of the Charter is known as the *Oakes* test. See *Oakes*, *supra* note 67 at paras. 69-71

⁶⁴⁶ McIntyre, *supra* note 491 at 110

⁶⁴⁷ *Law*, *supra* note 399

⁶⁴⁸ McIntyre, *supra* note 491 at 111

⁶⁴⁹ *Ibid.* at 107

⁶⁵⁰ *Ibid.* at 112. Sheila McIntyre highlighted that the government’s burden of proof may be relaxed at section 1 stage if government could establish the existence of one or more circumstances calling for judicial deference. However, she pointed that in *Gosselin*, *supra* note 467 the Court invoked such circumstances on behalf of the government during the section 15 analysis to rationalize overlooking evidentiary weakness in the government case.

⁶⁵¹ *Law*, *supra* note 399

proof on a section 15 claimant, and relieving the government of its burden of justification under section 1.⁶⁵² Therefore, it can be argued that section 1 of the Canadian Charter should not be applied to save the violation of section 15 in the case of unaccompanied minors.

However, given that section 96 of the *IRPA*⁶⁵³ discriminates unaccompanied minors under section 15 of the Canadian Charter⁶⁵⁴ and assuming that the limit of imposing subjective fear and objective fear is ‘prescribed by law’ within the meaning of section 1 of the Canadian Charter, it will be shown, in the next part, that the violation of equality right of unaccompanied minors cannot be upheld under section 1 of the Charter.

3.4 Violation is not reasonable and not demonstrably justified in a free and democratic society

The test to be applied to determine whether a violation can be justified under section 1 of the Charter, known as the Oakes test,⁶⁵⁵ requires 1) a pressing and substantial objective and 2) proportional means. A finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective,⁶⁵⁶ that is, “proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures”.⁶⁵⁷ Section 96 of the *IRPA*⁶⁵⁸ violates the right to equality of

⁶⁵² McAllister, *supra* note 450 at 64

⁶⁵³ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27)

⁶⁵⁴ Section 96 of the *IRPA* discriminates unaccompanied minors under section 15 of the Canadian Charter by requiring them to demonstrate both subjective fear and objective fear in order to establish their ‘well-founded fear’. See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5).

⁶⁵⁵ *Oakes*, *supra* note 67 at paras. 69-71; *Charkaoui*, *supra* note 67 at para. 67

⁶⁵⁶ *Oakes*, *ibid.* at paras. 70-71; *Charkaoui*, *ibid.*

⁶⁵⁷ See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*] (“[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the

unaccompanied minors seeking asylum in Canada under section 15 of the Charter by requiring them to demonstrate subjective and objective fear.⁶⁵⁹ To determine whether this violation can be saved under section 1 of the Charter,⁶⁶⁰ the Oakes test will be applied.

It has to be noted that the Oakes test is offered by Chief Justice Dickson as a universal rule, applicable to all Charter infringements.⁶⁶¹ However, *Andrews*,⁶⁶² which was an equality case, left some doubt to this position. In that case, Justice McIntyre took the view that the Oakes test was “too stringent for application in all cases”. The Court was actually divided evenly on whether the Oakes test should apply in equality cases. Nevertheless, the implicit assumption of the Court in the many equality cases that have been decided since *Andrews*⁶⁶³ is that the Oakes test ought to apply to section 15 cases.⁶⁶⁴ Although Justice McIntyre’s view has never been discussed, it seems that his view has been implicitly overruled.⁶⁶⁵

Hence, the Oakes test will be applied to determine whether the violation of equality right of unaccompanied minors by section 96 of the *IRPA* can be saved under section 1 of the Charter.

3.4.1 Pressing and Substantial Objective

rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures” at para. 95).

⁶⁵⁸ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27).

⁶⁵⁹ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5).

⁶⁶⁰ *Charter*, *supra* note 58, s. 1 which states that “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

⁶⁶¹ See Hogg, *Constitutional Law of Canada*, *supra* note 605 at 38-44

⁶⁶² *Andrews*, *supra* note 398

⁶⁶³ *Ibid.*

⁶⁶⁴ Hogg, *Constitutional Law of Canada*, *supra* note 605 at 38-45

⁶⁶⁵ *Ibid.*

The objective of section 96 of the *IRPA* is to require a person to establish a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion in order to be determined as a Convention Refugee.⁶⁶⁶ This objective is in line with the objective of the *IRPA*, with respect to refugees in section 3(2)(d) of the *IRPA*, which is to offer safe haven to persons with a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment.⁶⁶⁷ Therefore, the objective of section 96 of the *IRPA* is pressing and substantial. Hence, the first criterion of the Oakes test has been satisfied.

By the way, the argument of administrative efficiency can be advanced by the government as an objective to omit special consideration of minors to override their equality right. The government could argue that the objective of section 96 of the *IRPR* is administrative efficiency. It could claim that having different criteria of well-founded fear for unaccompanied minors could delay the whole refugee protection process, considering the voluminous amount of refugee claims. In addition, the government could argue that child sensitive criteria for children could involve higher cost and time to train personnel and experts, dealing with children. However, the government's arguments cannot stand. This is because "reducing administrative inconvenience and reducing expense are not... sufficient objectives to override...a vital constitutional right",⁶⁶⁸ which is the right to equality of unaccompanied minors here. Likewise, in

⁶⁶⁶ See *Begollari*, *supra* note 74 at para. 16, where the text of s. 96 of the *IRPA* is provided. Its analysis is given at paras. 17-19; Compare Edwards, *supra* note 57 in which Edwards points that age is not included in the refugee definition in article 1A(2) of the Refugee Convention as a specific ground for seeking asylum but that a range of potential claims with an age dimension is broad, including forcible or under-age recruitment into military service, family or domestic violence, infanticide, forced or underage marriage, female genital mutilation, forced labour, forced prostitution, child pornography, trafficking, and children born outside of strict family planning rules.

⁶⁶⁷ *Immigration and Refugee Protection Act*, *supra* note 32, s. 3(2)(d)

⁶⁶⁸ *R. v. Lee*, [1989] 2 S.C.R. 1384 at 1420, Wilson J., dissenting (In this case, Lamer J for the majority held that it was appropriate to deny the Charter right [to the benefit of trial by jury], s. 11(f) to those who had burdened the system with the cost of futilely empanelling a jury).

Singh v. Canada (Minister of Employment and Immigration),⁶⁶⁹ Justice Wilson had reasoned that

the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1.

Similarly, in respect to administrative efficiency, Peter Hogg argues that

[i]t should not be possible to take away a right just because, on balance, the benefits to others will outweigh the cost to the right-holder....Section 1 of the *Charter* would undermine everything that follows if it were interpreted as permitting the Court to uphold a limit on a guaranteed right whenever the benefits of the law imposing the limit outweighed the costs.⁶⁷⁰

Therefore, claims of cost and administrative efficiency should not suffice as the objective of a limit on a *Charter* right.⁶⁷¹

3.4.2 Proportional Means

The Oakes test⁶⁷² also requires the second criteria of proportional means. A finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective,⁶⁷³ that is, “proportionality between the deleterious effects of the measures which are responsible for limiting the rights or

⁶⁶⁹ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at para. 70

⁶⁷⁰ Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 854, cited in James C. Hathaway & R. Alexander Neve, “Fundamental Justice and the Deflection of Refugees from Canada” (1996) 34 Osgoode Hall L.J. 213 at para. 110

⁶⁷¹ See *Nova Scotia (Workers' Compensation Board)*, *supra* note 518 at paras. 109-110 (The Supreme Court of Canada has rejected claims of cost and administrative expediency as grounds of justification for a standard program to deal with ‘chronic pain’. The Court held that the standard program violated the equality right of workers who suffered from chronic pain and could not be justified under s. 1 of the *Charter* on the basis of cost or administrative expediency); See also *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381 at para. 64 [N.A.P.E.] (This is the only case where the Supreme Court of Canada had accepted that the saving of government money is a sufficiently important objective to justify a limit on a *Charter* right. Binnie J., who wrote the opinion of the Court, said that financial considerations would not “normally” suffice as the objective of a limit on a *Charter* right, but in this case, the government was managing a “financial crisis” that had attained a dimension that called for remedial measures.)

⁶⁷² *Oakes*, *supra* note 67 at paras. 69-71; *Charkaoui*, *supra* note 67 at para. 67

⁶⁷³ *Oakes*, *ibid.* at paras. 70-71; *Charkaoui*, *ibid.*

freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures”.⁶⁷⁴

3.4.2.1 Means rationally connected to the Objective

To achieve the objective of section 96 of the *IRPA*, which is to establish the well-founded fear to satisfy the definition of Convention Refugee, the means employed are to require the showings of subjective and objective components of the well-founded fear.⁶⁷⁵ Therefore, the means employed are rationally connected to the objective of section 96 of the *IRPA*. This is due to the fact that “[t]he subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear”.⁶⁷⁶ In addition, the Supreme Court of Canada has stated that subjective and objective components are necessary to satisfy the definition of Convention Refugee.⁶⁷⁷ Thus, the means employed, requiring subjective fear and objective fear, are rationally connected to the objective of section 96 of the *IRPA*, which is to establish the well-founded fear.

3.4.2.2 Minimal Impairment of Rights

In *R. v. Sharpe*,⁶⁷⁸ the Court used variable approach to deal with minimal impairment in section 1 of the Charter analysis. The courts can either take a stringent approach or liberal approach to minimal impairment. If the courts were to take a liberal approach to minimal impairment, it would be easier for the government to justify its means to limit a Charter right. If the courts were to take a restrictive or stringent

⁶⁷⁴ *Dagenais*, *supra* note 657 at para. 95

⁶⁷⁵ See *Begollari*, *supra* note 74 at para. 18 (The Court described that “well-founded fear” in the definition of a Convention refugee has two components; the first being a subjective fear of persecution felt by the applicant and the second, an objective component).

⁶⁷⁶ *Ward*, *supra* note 31 at para. 47; *Rajudeen*, *supra* note 73 at 134

⁶⁷⁷ *Ward*, *ibid.*

⁶⁷⁸ *Sharpe*, *supra* note 69 at paras. 96, 214 and 220. (The Court said that “[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups” at para. 220).

approach to minimal impairment, the government would find it difficult to justify its means.

In the context of asylum seeking unaccompanied minors, equality right of children as well as values to protect children from harm must be considered.⁶⁷⁹ Thus, a restrictive approach to minimal impairment test should be taken so that it will be difficult for the government to justify its means of requiring subjective fear and objective fear from unaccompanied minors to limit their equality right. A justification for a restrictive approach to minimal impairment is supported by evidence from CIC,⁶⁸⁰ the UNHCR⁶⁸¹ and the INS Guidelines,⁶⁸² which illustrate that children are unable to express subjective fear in the same manner as adults.

For example, CIC has recognized that “[c]hildren manifest fears differently than adults” and that “[c]hildren may not be able to articulate their fears in the same way as adults”.⁶⁸³ As well, the UNHCR has noted that “[c]hildren may manifest their fears in ways different from adults” and that in the examination of children’s claims, it is necessary “to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution”.⁶⁸⁴

Likewise, the INS Guidelines has recognized that “a well-founded fear of persecution involves both subjective and objective elements”, however, for child asylum

⁶⁷⁹ See e.g. *ibid.* where it is stated that “[a]n examination of the social, legislative and factual context of an impugned provision and the nature of the right that it has infringed is important in determining the degree of deference owed to the legislature in applying the various steps in the s. 1 analysis. What type of proof should the Court require of the government to justify its choice of means? How much evidence must the government provide of the harm which it has sought to address?” at para. 157. Moreover, a principled and contextual approach to s. 1 ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. At each stage of the s. 1 analysis close attention must be paid to the factual and social context in which an impugned provision exists.

⁶⁸⁰ Citizenship and Immigration Canada, *PP1: Processing Claims for Refugee Protection in Canada*, *supra* note 11 at 60.

⁶⁸¹ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at 12-13.

⁶⁸² INS GUIDELINES, *supra* note 137 at 11

⁶⁸³ Citizenship and Immigration Canada, *PP1: Processing Claims for Refugee Protection in Canada*, *supra* note 11 at 60

⁶⁸⁴ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 3 at 12-13.

seekers, “the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess”.⁶⁸⁵ In fact, the INS Guidelines recommend that for child asylum seekers, “[t]he adjudicator may also have to look to the circumstances of the parents and other family members, including their situation in the child’s country of origin” so that the treatment of a child’s family can support a well-founded fear of the child.⁶⁸⁶

Therefore, the courts should take a restrictive approach to minimal impairment so that the government cannot easily justify limiting the equality right of unaccompanied minors protected by the Charter.

The means should impair “as little as possible” the right or freedom in question, even if rationally connected to the objective.⁶⁸⁷ Here, the means requiring objective fear and subjective fear to satisfy the well-founded fear in the definition of a Convention Refugee, in section 96 of the *IRPA*, for unaccompanied minors do not impair as little as possible their right to equality under section 15 of the Charter. Unaccompanied minors seeking asylum in Canada should not be required to demonstrate both subjective fear and objective fear, like adult refugee claimants. There are other means to minimally impair their right to equality. To satisfy the well-founded fear for unaccompanied minors seeking asylum, objective fear can be considered exclusively for them, eliminating the need to consider their subjective fear. Justice Hugessen held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms”.⁶⁸⁸ It is clear from this decision that the subjective element of the well-founded fear should be dispensed with because insisting on it would lead to denial of refugee protection in objectively well-founded refugee claims of unaccompanied minors. In addition, the duty to accommodate unaccompanied minors seeking asylum, with a single objective element for the well-founded fear, can be

⁶⁸⁵ INS GUIDELINES, *supra* note 137 at 11

⁶⁸⁶ *Ibid.*

⁶⁸⁷ See *Oakes*, *supra* note 67 at para. 70

⁶⁸⁸ *Yusuf*, *supra* note 202 at para. 5

considered as a corollary of the minimal impairment test.⁶⁸⁹ This is because in *Eldridge*,⁶⁹⁰ the Supreme Court of Canada has stated that, in cases concerning section 15(1) of the Canadian Charter, ‘reasonable accommodation’ was equivalent to the concept of ‘reasonable limits’ provided in section 1 of the Canadian Charter.

Therefore, the means to require both objective fear and subjective fear, to satisfy the well-founded fear in section 96 of the *IRPA* for unaccompanied minors, does not minimally impair their right to equality under section 15 of the Charter. In fact, the alternative means to require only objective fear for unaccompanied minors would minimally impair their equality right under section 15.

In addition, this alternative means does not impair the objective of section 96 of the *IRPA*, which is to require a person to establish a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion in order to be determined as a Convention Refugee. This is because examination of the drafting history of the Refugee Convention reveals that “fear” was employed to mandate a forward-looking assessment of risk (i.e. objective fear) and not to require an examination of the emotional reaction of the refugee claimant (i.e. subjective fear).⁶⁹¹ Such an interpretation is consistent with the French-language text of the Refugee Convention definition (“craignant avec raison d’être persécutée”).⁶⁹² Therefore, the alternative means to require unaccompanied minors to establish their objective fear only, eliminating the requirement of their subjective fear, to establish their well-founded fear of persecution does not impair the objective of section 96 of the *IRPA*.

3.4.2.3 Proportionality

⁶⁸⁹ See *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para. 52 in which the Supreme Court of Canada stated that Lemelin J. had expressed the view that “[t]he duty to accommodate this student is a corollary of the minimal impairment [test]”.

⁶⁹⁰ *Eldridge*, *supra* note 460 at para. 79; See *ibid.*

⁶⁹¹ See Hathaway, *The Law of Refugee Status*, *supra* note 129 at 66

⁶⁹² See *ibid.*

A finding of proportionality requires proportionality between the effects of the infringement and the importance of the objective.⁶⁹³ In other words, there must be proportionality between the effects of the measures which are responsible to limit the Charter right or freedom, and the objective that has been identified as sufficiently important.⁶⁹⁴ This sub-test was refined or clarified by the majority of the Court in *Dagenais v. Canadian Broadcasting Corp.* as follows: “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.”⁶⁹⁵ The *Dagenais* refinement requires that courts consider not only the objective of the impugned law but also its salutary effects, in applying the sub-test, mentioned above.⁶⁹⁶ It should be noted that in the majority of cases, the crucial determination of section 1 analysis are made at the minimal impairment stage of the Oakes test.⁶⁹⁷ In every instance in which the minimal impairment test was passed, the proportionality test was passed. Whereas, in every instance where the minimal impairment test was failed, the proportionality test was either failed or not considered.⁶⁹⁸

The effects of infringement of equality rights under section 15 of the Charter are denial of refugee protection to unaccompanied minors. In other words, the effects, of requiring subjective fear and objective fear for the ‘well-founded fear’ in section 96 of the *IRPA* for unaccompanied minors, are denial of refugee protection for unaccompanied minors. There is no proportionality between the effects of the infringement and the importance of the objective of section 96 of the *IRPA*.

There is no salutary effect to the discrimination that results from imposing objective fear and subjective fear requirements on unaccompanied minors. Refugee

⁶⁹³ *Oakes*, *supra* note 67 at paras. 70-71; *Charkaoui*, *supra* note 67 at para. 67

⁶⁹⁴ *Oakes*, *ibid.* at para. 70

⁶⁹⁵ *Dagenais*, *supra* note 657 at para. 95

⁶⁹⁶ Joel Bakan *et al.*, eds., *Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery Publications Limited, 2003) at 761

⁶⁹⁷ *Ibid.* at 762

⁶⁹⁸ Joseph Eliot Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 8th ed. Vol. 2 (Edmonton: Juriliber Limited, 2001) at 238

status is granted to persons who can demonstrate their subjective fear and objective fear to establish their well-founded fear of persecution.⁶⁹⁹ The deleterious effect of the measure is that section 96 of the *IRPA* deprives unaccompanied minors of refugee protection when they are unable to demonstrate their subjective fear because of their age and vulnerability. This deleterious effect is not limited, when one considers that “[t]he subjective basis for the fear of persecution rests solely on the credibility of the applicants”⁷⁰⁰ and that most of the Federal Court of Canada decisions on refugee claims by unaccompanied minors involve refusals by the IRB based on lack of credibility of the minor claimant.⁷⁰¹ Considering unaccompanied minors’ young age, their vulnerability, their psychological condition associated with traumas and their unaccompanied status without parental support, it would be unreasonable to expect a minor to present evidence with same degree of precision as adults with respect to context, timing, importance and details.⁷⁰² When unaccompanied minors’ narrative and the facts supporting their refugee claim are not credible, they would be deemed not able to establish their subjective fear of persecution and thus, they could not establish that they are in need of refugee protection.⁷⁰³

Hence, the deleterious effect of the measure is depriving refugee protection to unaccompanied minors for failing to demonstrate their subjective fear and there is no salutary effect of the measure. Therefore, there is no proportionality between the deleterious and the salutary effects of the measures.

⁶⁹⁹ *Kwiatkowsky*, *supra* note 627

⁷⁰⁰ *Maximilok*, *supra* note 320 at para. 17

⁷⁰¹ See *Uthayakumar*, *supra* note 326; *Manimaran v. Canada (Minister of Citizenship & Immigration)* (1995), 102 F.T.R. 199 [*Manimaran*]; *Ali v. Canada (Minister of Citizenship & Immigration)* (July 23, 1995), Doc. T-3026-92, Dubé J. (F.C.T.D.) [*Ali*]; *Sivanathan v. Canada (Minister of Employment & Immigration)* (1994), 81 F.T.R. 132, [1994] F.C.J. No. 756 (T.D.) [*Sivanathan*]; *Gonzalez v. Canada (Minister of Employment & Immigration)* (November 18, 1993), Doc. 92-T-1229, Simpson J. (F.C.T.D.) [*Gonzalez*]; *Kurukulasuriya (Guardian of) v. Canada (Minister of Employment & Immigration)* (July 6, 1994), IMM-2100-93, Rothstein J. (F.C.T.D.) [*Kurukulasuriya*]; *Li*, *supra* note 38

⁷⁰² *Li*, *ibid.*, Pelletier J. at para. 15; See IRB, “Assessment of Credibility in Claims for Refugee Protection”, *supra* note 36 at 83-84

⁷⁰³ See *Desronvilles v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 711 at para. 12 [*Desronvilles*]

Consequently, section 96 of the *IRPA*⁷⁰⁴ violates the right to equality of unaccompanied minors seeking asylum in Canada under section 15 of the Charter by requiring them to demonstrate subjective and objective fear for their ‘well-founded fear’.⁷⁰⁵ By applying the Oakes test, this violation cannot be saved under section 1 of the Charter. Therefore, this violation is not reasonable and not demonstrably justified in a free and democratic society. For this reason, section 96 of the *IRPA* is unconstitutional and invalid.

3.5 Remedies for Systemic Inequality

In *C.N.R. v. Canada (Human Rights Commission)*,⁷⁰⁶ the Supreme Court of Canada stated that courts have to fashion group-based systemic remedies to foster conditions for equality to flourish so that web of policies, practices and attitudes that create systemic inequality will be identified and destroyed. Section 15 of the Canadian Charter came about later to remedy systemic inequality.⁷⁰⁷ The purpose of section 15, according to Justice McIntyre in *Andrews*,⁷⁰⁸ is to ensure equality in the formulation and application of the law, stating that section 15, when read as a whole, is “a compendious expression of a positive right to equality in both the substance and the administration of the law”. In Justice McIntyre’s view, promoting a society in which all are recognized at law as human beings, equally deserving concern, respect and consideration involves the promotion of equality. This has a large remedial measure.⁷⁰⁹

Indeed, moral and ethical principle fundamental for a free and democratic society underlies section 15 of the Canadian Charter, which enshrines the right to equal

⁷⁰⁴ See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27).

⁷⁰⁵ See *Yusuf*, *supra* note 202 (Hugessen J.A. held that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms” at para. 5)

⁷⁰⁶ *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 114

⁷⁰⁷ Mary Eberts, “Section 15 Remedies for Systemic Inequality: You Can’t Get There From Here” (2006) 33 S.C.L.R. (2d) 389

⁷⁰⁸ *Andrews*, *supra* note 398 at para. 34

⁷⁰⁹ *Ibid.*

protection and benefit of the law.⁷¹⁰ Therefore, the framers of the Canadian Charter had intended the legislatures to promote equality under section 15.⁷¹¹ For this reason, section 15(2) of the Canadian Charter ensures that laws, programs and activities of the governments ameliorate disadvantage, expecting the governments to use these measures to advance equality.⁷¹²

However, Mary Eberts notes that government responses to promote equality under section 15 of the Canadian Charter have been disappointing.⁷¹³ For instance, she notes that significant legislative reform to deal with historical inequalities was not seen, though being part of the three-year Charter compliance process. In addition, a dichotomy could be seen between compliance with section 15 of the Charter and ‘real’ policy formulation.⁷¹⁴ For example, the federal government made a clear distinction between the technical exercise to bring statutes in compliance with the formal requisites of section 15, on one hand, and the policy exercises to reform the *Criminal Code*, *Unemployment Insurance Act*, and the *Indian Act* and to deal with the recommendations of the Special Committee on Visible Minorities, *Equality Now*, on the other hand.⁷¹⁵ Mary Eberts notes that in all these areas, serious equality issues remain outstanding or have to be addressed in equality litigation.⁷¹⁶ Likewise, Parliament has to bring section 96 of the *IRPA* in compliance with the formal requisites of section 15 of the Canadian Charter, so that inequality resulting from applying subjective element and objective element for the ‘well-founded fear’ to unaccompanied minors and adult refugee claimants alike can be resolved to promote equality for the former, thus remedying the systemic inequality.

Equally important, in the event of a successful equality litigation by an unaccompanied minor or a group of unaccompanied minors seeking asylum in Canada, demonstrating that section 96 of the *IRPA* violates their equality right under section 15

⁷¹⁰ *Ibid.*

⁷¹¹ Eberts, *supra* note 707 at 392

⁷¹² *Ibid.*

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.* at 392-393

⁷¹⁶ *Ibid.* at 393

of the Canadian Charter, the first step in choosing a remedial course under section 52 of the Charter would be to define the extent of the inconsistency, which must be struck down, in section 96 of the *IRPA* when read in compliance with the Charter.⁷¹⁷ Usually, the manner in which section 96 of the *IRPA* violates the Charter and the manner in which it fails to be justified under section 1 of the Charter will be critical to this determination.⁷¹⁸ Where the second and/or third elements of the proportionality test are not met, there is more flexibility to define the extent of the inconsistency.⁷¹⁹ Moreover, striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met.⁷²⁰ This would be the case for section 96 of the *IRPA*. In addition, after having determined the extent of the inconsistency, the means of dealing with it, whether by way of severance, reading in, or striking down the impugned provision, section 96 of the *IRPA*, in its entirety, must also be considered.⁷²¹

With respect to section 96 of the *IRPA*, reading in would be the most appropriate remedial option. When a statute is under- inclusive such that it fails to extend certain protections or benefits to individuals or groups in such a way that the Charter is violated, the courts may read in or extend benefits by actually adding in the necessary words to the legislation in question.⁷²²

Like in *R. v. Sharpe*,⁷²³ where the majority of the Supreme Court of Canada chose to repair the defects in the impugned provision by reading in exceptions in order to avoid the overbreadth, the term ‘well-founded fear’ in section 96 of the *IRPA* can be read in to include an exception to require objective fear only from unaccompanied

⁷¹⁷ *Schachter v. Canada*, [1992] 2 S.C.R. 679 at para. 43. At paras. 84-85, the Supreme Court identifies a range of possible actions pursuant to section 52, such as, striking down legislation either with immediate effect or with a temporary suspension of the declaration of invalidity, reading down (reading out) or reading in (reading up). Section 52 of the *Constitution Act*, 1982 mandates invalidation of any law that is inconsistent with the provisions of the Constitution, to the extent of that inconsistency.

⁷¹⁸ *Ibid.* at para. 43

⁷¹⁹ *Ibid.* at para. 49

⁷²⁰ *Ibid.* at para. 50

⁷²¹ *Ibid.* at para. 51

⁷²² Michael Bryant & Lorne Sossin, *Public Law* (Toronto: Thomson Canada Limited, 2002) at 93

⁷²³ *Sharpe*, *supra* note 69 (Reading in is used by the majority since it was able “to identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance” at para. 115)

minors seeking asylum in Canada. Reading in was also used in *Vriend v. Alberta*⁷²⁴ in which the Supreme Court of Canada read the prohibition of discrimination on the basis of sexual orientation into the *Alberta Individual's Rights Protection Act*. Given that the judicial interpretation of 'well-founded fear', which requires subjective fear and objective fear for unaccompanied minors, violates section 15 of the Charter, reading in would be the most appropriate constitutional remedy to include an exception to require objective fear only for unaccompanied minors. This means that adult refugee claimants will have to show the requirement of subjective fear and objective fear for their well-founded fear while unaccompanied minors have to demonstrate their objective fear only.

Reading in is also more appropriate than striking down a portion of section 96 of the *IRPA*, even if the declaration of invalidity of that portion is temporarily suspended until Parliament has an opportunity to fill the void.⁷²⁵ This is because section 96 of the *IRPA*, as enacted, seems valid on its face, but only the interpretation of 'well-founded fear' has to be changed by the courts. The entire provision has to be struck down if striking down a portion of section 96 of the *IRPA* is not possible.⁷²⁶ In such a case, reading in has a clear advantage over striking down the entire provision of section 96 of the *IRPA* because unaccompanied minors in need of refugee protection may be treated equally without having to at least temporarily deny refugee protection to all persons.⁷²⁷

⁷²⁴ *Vriend, supra* note 575

⁷²⁵ See *Schachter, supra* note 717 at paras. 78-79 (After identifying what portion of the provision must be struck down, the final step would be to determine if the declaration of invalidity of that portion should be suspended so that Parliament has an opportunity to fill the void.)

⁷²⁶ See e.g. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (The administrative system established in s. 251(4) of the Criminal Code fails to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. The procedures and administrative structures established in s. 251 to provide for therapeutic abortions do not comply with the principles of fundamental justice. Thus, the Court held that section 7 of the Charter was infringed and that the infringement could not be saved under section 1 of the Charter. In this case, it was not possible to strike down s. 251(4) of the Criminal Code alone. The Court had to strike down the whole of s.251 of the Criminal Code instead of a portion of s.251. The Court said that "it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section. The appeal therefore be allowed and s. 251 as a whole struck down under s. 52(1) of the Constitution Act, 1982" at para. 65).

⁷²⁷ See *Bryant & Sossin, supra* note 722 at 93; See e.g. *Phillips v. Nova Scotia (Social Assistance Appeal Board)* (1986), 27 D.L.R. (4th) 156 (N.S.T.D.), affirmed (1986), 34 D.L.R. (4th) 633 (N.S.C.A.), where a single father successfully challenged a welfare statute which failed to extend similar benefits to single fathers as it did with single mothers, but when the entire provision was nullified, both single mothers and fathers were denied benefits, leading some critics to refer to this remedial approach as "equality with a vengeance."

Striking down section 96 of the *IRPA* would not be an appropriate constitutional remedy as it would deny refugee protection to all refugee claimants; section 96 of the *IRPA* furthers fundamental rights claims.⁷²⁸ In the context of section 96 of the *IRPA*, suspension of declaration of invalidity is also not appropriate although it is a means to avoid a legal vacuum during the hiatus before the legislature could replace the invalid legislation.⁷²⁹ This is because “reading in is much preferable [to a delayed declaration of invalidity] where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter”.⁷³⁰

Therefore, with respect to section 96 of the *IRPA*, reading in would be the most appropriate remedial option if unaccompanied minors were to demonstrate that section 96 of the *IRPA* violates their equality right under section 15 of the Canadian Charter by requiring them to demonstrate both their subjective fear and objective fear for their well-founded fear.

On the other hand, with regard to equality promotion, Justice Binnie has emphasized that judicial deference to legislative supremacy includes deference to legislative changes of mind about whether to promote equality.⁷³¹ He has explained that legislative adoption of a remedial measure does not “constitutionalize” it to fetter its repeal.⁷³² For this reason, a legislature has its freedom to “experiment” with different “machinery” to accomplish equality.⁷³³

Accordingly, in Canada, the IRB’s guidelines on procedural and evidentiary issues for minor children⁷³⁴ have been issued to deal with refugee claims of children. However, these guidelines, which are issued by the Chairperson of the IRB pursuant to

⁷²⁸ See e.g. *Vriend*, *supra* note 575, where the Court used ‘reading in’ instead of striking down the *Individual’s Rights Protection Act*, which furthers human rights in the province of Alberta.

⁷²⁹ *Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867* (sub nom. *Reference re Manitoba Language Rights*), [1985] 1 S.C.R. 721 at 758 and 767; David Sgayias, Q.C., “Charter Remedies in 2001: Proceeding Cautiously” (2002) 16 S.C.L.R. (2d) at 416

⁷³⁰ *Schachter*, *supra* note 717 at 716, Lamer C.J.

⁷³¹ *N.A.P.E.*, *supra* note 671; *Eberts*, *supra* note 707 at 395

⁷³² *N.A.P.E.*, *ibid.* at para. 33

⁷³³ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554

⁷³⁴ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12

Section 65(3) of the *Immigration Act*, are not law.⁷³⁵ These guidelines are intended to be followed unless circumstances are such that a different analysis is appropriate.⁷³⁶ These guidelines are issued to address the particular vulnerabilities of child refugee claimants.⁷³⁷ However, these guidelines are not legally binding on the IRB members because they can exercise their independent decision-making authority.⁷³⁸ Furthermore, guidelines neither guarantee nor mandate judicial compliance.⁷³⁹

Although the guidelines on child refugee claimants recognize that a child refugee claimant may not be able to express subjective fear of persecution in the same manner as an adult refugee claimant, the only recommendation made is to put more weight on the objective element rather than subjective element of the claim.⁷⁴⁰ This does not eliminate the subjective element from the traditional criteria of well-founded fear in section 96 of the *IRPA* for unaccompanied minors.

In addition, although the Federal Court of Canada has recognized that a young child is “incapable of experiencing [subjective] fear the reasons for which clearly exist in objective terms”,⁷⁴¹ the federal legislature has not proceeded to ‘experiment’ with different ‘machinery’ to accomplish equality for unaccompanied minors seeking refugee status in Canada. This may be due to the fact that the Supreme Court of Canada made it clear, in *Ward*⁷⁴² that both components, subjective fear and objective fear, are required to establish the well-founded fear of persecution of a refugee claimant. Nevertheless, inequality resulting from applying the same criteria of well-founded fear to unaccompanied minors and adult refugee claimants can be resolved by adopting child-sensitive criteria for unaccompanied minors in section 96 of the *IRPA*, thus, remedying

⁷³⁵ *Narvaez*, *supra* note 199 at para. 12; *Thamotharem*, *supra* note 199 at para. 89

⁷³⁶ *Narvaez*, *ibid.*

⁷³⁷ *Thamotharem*, *supra* note 199 at para. 89

⁷³⁸ *Ibid.* at para. 102

⁷³⁹ Carolyn J. Seugling, “Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States” (2004) 37 *Vand. J. Transnat’l L.* 861 at 879

⁷⁴⁰ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12

⁷⁴¹ *Yusuf*, *supra* note 202

⁷⁴² *Ward*, *supra* note 31 at para. 47 (“...the test is bipartite: 1) the claimant must subjectively fear persecution; and 2) this fear must be well-founded in an objective sense.”)

the systemic inequality for the latter.⁷⁴³ For instance, with respect to the interpretation of ‘well-founded fear’ in section 96 of the *IRPA*, Parliament could adopt an exception clause to require objective fear only for an unaccompanied minor seeking asylum in Canada.⁷⁴⁴ This would ensure that section 96 of the *IRPA* meet the requirements of the Charter.

According to Mary Eberts, to revitalize section 15 of the Canadian Charter as a substantive remedy for systemic inequality, it is necessary to return to its purpose as perceived by the Court in *Andrews*.⁷⁴⁵ She suggested two ways to do this.

First, it is necessary to change the jurisprudence of the Supreme Court of Canada so as to move it away from its view that it is really up to the Parliament to decide how much equality it wants to promote, and the manner to promote it.⁷⁴⁶ Until then, one has to struggle through the numerous hurdles of the test in *Law*⁷⁴⁷ to demonstrate a violation of section 15 of the Charter.⁷⁴⁸ Importantly, until unaccompanied minors demonstrate a violation of section 15 of the Canadian Charter through equality litigation, the courts would not be able to do ‘reading in’ to include the exception of objective fear only for unaccompanied minors.

Second, to return to the original equality promoting purpose of section 15 of the Canadian Charter, it is necessary for government actors to address reform efforts because they would be the first resort for equality promotion.⁷⁴⁹ Governments could choose to integrate equality values into their policy process, giving weight and importance to rights. In order to establish Charter focused policy process, governments have to implement the promotion of equality as a desired goal and have to commit to

⁷⁴³ This means adults refugee claimants have to prove subjective fear and objective fear. However, unaccompanied minors only need to prove objective fear exclusively for the ‘well-founded fear’ in section 96 of the *IRPA*, if this section were to be revised by the federal legislature to remedy systemic inequality for them.

⁷⁴⁴ See e.g. *Sharpe*, *supra* note 69 at paras. 124-125 (When considering the appropriateness of reading in the exception clauses, Chief Justice McLachlin suggested that exception clauses are the sort of provision that Parliament would have adopted had it known the limitations of the Charter.)

⁷⁴⁵ Eberts, *supra* note 707 at 410

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Law*, *supra* note 399

⁷⁴⁸ Eberts, *supra* note 707 at 410

⁷⁴⁹ *Ibid.*

measures achieving it.⁷⁵⁰ Instead of governments doing a Charter analyses at various stages of policy and legislative process so as to risk-proof against possible equality litigation, it would be better to incorporate equality values into the policy and legislative process.

Accordingly, systemic inequality could be rectified for unaccompanied minors seeking asylum in Canada, if Parliament could promote substantive equality measure for them. Either section 96 of the *IRPA* could be revised to require a single objective element for unaccompanied minors seeking refugee status, eliminating the need to consider subjective fear for them, or a new legislation could be adopted to consider refugee claims of unaccompanied minors in Canada, recognizing their vulnerability and their need for child sensitive criteria of well-founded fear. Before implementing the new legislation for unaccompanied minors seeking asylum in Canada, equality values could be incorporated at various stages of the legislative process. This would be better option for the Parliament instead of waiting for the Court to do ‘reading in’ in the event of successful equality litigation by unaccompanied minors.

As noted by Justice L’Heureux-Dubé, the task to root out inequality and injustice from Canadian society is to advance to a higher stage because increasingly “inequality and discrimination often stem not from express intentions on the part of any given individual or group, but rather from the effects of innocently motivated actions”.⁷⁵¹ For this reason, she said that equality has to be understood and be made as part of our thinking on every issue.⁷⁵² Hence, there must be systemic studies of government policies and institutional practices that impact unaccompanied minors so that Canadians could take more principled position towards them. This is because the current lack of knowledge about unaccompanied minors puts this highly vulnerable group at greater risk of neglect.⁷⁵³

⁷⁵⁰ *Ibid.* at 411

⁷⁵¹ L’Heureux-Dubé, “The Legacy”, *supra* note 565 at 396-397

⁷⁵² *Ibid.* at 397

⁷⁵³ See Judith Wouk *et al*, “Unaccompanied Minors and Refugee Protection in Canada” (10th International Metropolis Conference, Citizenship and Immigration of Canada, 17-21 October 2005), online: CIC<http://www.toronto.ca/metropolis/metropolistoronto2005/pdf/Metropo_DBFAF.pdf>, where systematic data collection with consistent definitions for future policy development was recommended. As well, it was noted in this conference that unaccompanied minors and separated minor refugees are

In essence, part 3 dealt with Charter justification, specifically, the right to equality of the Canadian Charter, to use a single objective element for unaccompanied minors to establish their well-founded fear in refugee determination hearings. In the next part, philosophical justification will be used to recommend a single objective element to establish well-founded fear in the case of unaccompanied minors seeking asylum in Canada.

4 Philosophical justification for a Single Objective Element for Unaccompanied Minors

In this part, the recommendation, to use exclusively a single objective element to assess the well-founded fear of persecution in the case of unaccompanied minors, will be explored using Ronald Dworkin's legal theory. Dworkin's legal theory on principle, policy and rule will be explored to philosophically defend the use of the best interests of the child principle to interpret the criteria of well-founded fear for asylum seeking unaccompanied minors. As well, a brief discussion on Dworkin's theory, distinguishing between matters of substance and matters of process, will show why judges have to make substantive political decisions to redefine the criteria of well-founded fear, to be consisting of a single objective element, in section 96 of the *IRPA* for unaccompanied minors seeking refugee status in Canada. In addition, Dworkin's legal theory on constructive interpretation will be analyzed. Furthermore, Dworkin's two conceptions of the rule of law will be discussed. Finally, Dworkin's legal theory on the right to equality and reverse discrimination will also be analyzed to philosophically justify the use of a single objective element for well-founded fear in the case of unaccompanied minors seeking asylum in Canada.

distinct from adult refugees or non-separated claimants; See Mehrunnisa Ahmad Ali, "Children alone, seeking refuge in Canada" *Refuge* 23:2 (22 June 2006) 68; See Judith Kumin & Danya Chaikel, "Taking the Agenda Forward: The Roundtable on Separated Children Seeking Asylum in Canada" *Refuge* 20:2 (February 2002) 73 at 74 : "There is a lack of reliable data on the scope of the problem of separated asylum-seeking children. Data provided by Citizenship and Immigration Canada (CIC) and the Immigration and Refugee Board (IRB) are partial at best. A need therefore exists for the authorities at all levels to devote attention to gathering such information and making it available". Kumin and Chaikel noted that separated children have lower success rate in refugee claims compared to accompanied children or adults. They emphasized that many separated children in the United States and Canada are without a regular legal status.

To begin with, the principle of the best interests of the child will be introduced first before exploring into Dworkin's legal theory on principle, policy and rule.

4.1 The Principle of the Best Interests of the Child

The principle of the 'best interests of the child' has an established history under the common law tradition, particularly in the area of family law in England, countries of the Commonwealth, the United States, and in the English-speaking Caribbean.⁷⁵⁴ This principle is a legal standard that is used today by courts of the common law system in deciding cases of child custody, guardianship, child support and other issues of family law.⁷⁵⁵

To determine the best interests of the child, courts are at the forefront of the decision-making process. To ascertain what is in the best interests of the child, courts turn to a wide range of sources and order investigations through social workers, teachers, psychologists and other professionals.⁷⁵⁶ Nevertheless, the principle of the best interests of the child has been the subject of academic debate among lawyers, philosophers, psychologists and people involved in child development.⁷⁵⁷ Thus, this principle is a subject of controversy within domestic jurisdictions. One of the difficulties with the principle of the best interests of the child is in its application which depends on circumstances of each instance in which the best interests are to be determined.⁷⁵⁸ Generally, the factors that have to be considered are: Firstly, the opinion of the child and

⁷⁵⁴ Rebeca Rios-Kohn, "A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries", in UNICEF, *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (New York: Cambridge University Press, 2007) 34 at 44

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

⁷⁵⁷ Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (New York: Martinus Nijhoff Publishers, 2002) at 45 [Breen, *The Standard of the Best Interests of the Child*]

⁷⁵⁸ *Ibid.*

of his family members; secondly, the child's sense of time; thirdly, the child's need for continuity of existing relationships; and finally, the risk of harm to the child.⁷⁵⁹

One attempt to define the best interests of the child principle in value preference would be to see that "it is in society's best interests for the law to make the child's needs paramount over those of any adult".⁷⁶⁰ This view was reflected in the guidelines provided by Goldstein, Feud, and Solnit in *Beyond the Best Interests of the Child*.⁷⁶¹ These guidelines focused on the requirement to safeguard the physical and psychological needs of the child. As well, the authors of these guidelines attempted to develop a best interests standard by creating guidelines for decision-making in law that deals with selecting and manipulating the child's environment to improve and nourish his internal environment. The authors also argued that children were not adults in miniature; rather, they were beings in their own right. Moreover, children differed from adults in their mental nature, their functioning, their understanding of events and their reaction to these events.⁷⁶² Furthermore, children also differed in the course of their individual growth and development as family members.⁷⁶³

In international law, Article 3(1) of the *Convention on the Rights of the Child* (CRC) mandates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁷⁶⁴ The role of this article is that it can serve to evaluate laws, practices, and policies relating to children that are not covered by express obligations in the CRC.⁷⁶⁵ The reference to "all actions concerning children" in Article 3(1) of the CRC implies a wide application of

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.* at 46

⁷⁶¹ Joseph Goldstein, Anna Freud & Albert Solnit, *Beyond the Best Interest of the Child* (London: Burnett Books, 1980)

⁷⁶² Breen, *The Standard of the Best Interests of the Child*, *supra* note 757 at 46

⁷⁶³ *Ibid.*

⁷⁶⁴ CRC, *supra* note 22, art. 3

⁷⁶⁵ Sharon Detrick, *A Commentary On The United Nations Convention On The Rights Of The Child* (Boston: Martinus Nijhoff Publishers, 1999) at 92

the best interests of the child principle.⁷⁶⁶ Since the article does not make any specific reference to the rights recognized in the CRC, it can be assumed that it is applicable with each CRC's substantive provisions as well as to actions that are not covered by express obligations in the Convention.⁷⁶⁷

Furthermore, the use of the term "children" rather than "child" in Article 3(1) of the CRC, indicates that an overly restrictive interpretation of the word "concerning" should not be adopted.⁷⁶⁸ In other words, the use of "concerning" in connection with "children" suggests that actions which have a direct impact on a child as well as other actions which may have an impact on "children" as a group are also covered.⁷⁶⁹

The use of the expression of "a primary consideration" in Article 3(1) of the CRC, instead of "the primary consideration", indicates that the best interests of the child do not have absolute priority above other considerations, although the principle is a consideration of first importance among other considerations.⁷⁷⁰ The drafters of the CRC may have wished to ensure a degree of flexibility in the application of the best interests of the child because the principle in Article 3(1) of the CRC was meant to be of broad application.⁷⁷¹

Article 3(1) of the CRC establishes the best interests of the child as a fundamental principle of interpretation.⁷⁷² The principle of the best interests of the child is relevant as an aid to construction when there is a need to clarify a provision in the CRC or when there are competing rights that must be resolved to ensure the most favorable outcome in all actions that concern the child.⁷⁷³ As noted by Bhabha and

⁷⁶⁶ Philip Alston & Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (Florence: Innocenti Studies, 1996) at 9

⁷⁶⁷ Detrick, *supra* note 765 at 90

⁷⁶⁸ *Ibid.*

⁷⁶⁹ Jaap E. Doek, "Social-Political Aspects of a Child's Best Interests" (Presentation at the Interdisciplinary Symposium, Le bien de l'enfant en perspective, delivered at the University of Fribourg, 1-2 March 2002, online at <http://www.jaapedoek.nl/publications/keynotes/keynote_329.doc>

⁷⁷⁰ Detrick, *supra* note 765 at 91

⁷⁷¹ *Ibid.*

⁷⁷² Bhabha & Young, *supra* note 140 at nn. 46-48

⁷⁷³ P. Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", in P. Alston, (ed.) *The Best Interests of the Child – Reconciling Culture and Human Rights* (Oxford: Clarendon Press, 1994) 5 at 16

Young, this principle draws together the traditional thinking about child welfare, protection and physical well-being with the modern, rights based accent on child's independence, autonomy and individuality.⁷⁷⁴ Nevertheless, the interpretation and application of the principle of the best interests of the child is the single most difficult challenge in dealing with unaccompanied minors.⁷⁷⁵ Although the initial point of decision-making for unaccompanied minors is clearly the best interests test,⁷⁷⁶ the problem with this test is that it lacks definition and criteria.⁷⁷⁷ There is no consensus on the factors to be considered in establishing 'best interests', or on the values to be attached to those factors. Therefore, the application of the best interests is subject to inherent value judgments.⁷⁷⁸

Equally important, the Supreme Court of Canada regards the best interests of the child principle as an established legal principle in international law and domestic law.⁷⁷⁹ Moreover, the Court acknowledged that this principle carries great power in many contexts because many Canadian statutes name the best interest of the child as a legal consideration.⁷⁸⁰

Indeed, the Chairperson of the United Nations Committee on the Rights of the Child, Jaap E. Doek emphasizes that the best interests of the child principle "should be implemented in an holistic way, with consequences for decisions concerning an individual child and for policies and programmes of the government and not only those with an immediate impact on children."⁷⁸¹ According to him, the implementation of this principle is a matter of rules and policies as well as attitude and understanding. Thus, for

⁷⁷⁴ Bhabha & Young, *supra* note 140 at nn. 46-48

⁷⁷⁵ Kumin & Chaikel, *supra* note 753 at 74

⁷⁷⁶ See E. Diane Pask, "Unaccompanied Refugee and Displaced Children: Jurisdiction, Decision-Making and Representation" (1989) 1:2 Int'l J. Refugee L. 199 at 212 (The "UNHCR had adopted the 'best interests' test in the 'Guidelines for Durable Solutions' and applied it to Kampuchean minors; it has been recognized by the Director of International Protection as the 'point of departure' for actions concerning unaccompanied minors.")

⁷⁷⁷ Robert Mnookin, "Child Custody Adjudication: Judicial Function in the Face of Indeterminacy" (1975) 39 Law and Contemporary Problems 226

⁷⁷⁸ Pask, *supra* note 776 at 212

⁷⁷⁹ Canadian Foundation, *supra* note 424 at para. 9

⁷⁸⁰ *Ibid.*

⁷⁸¹ Doek, *supra* note 769

this purpose, he recommends ongoing awareness campaigns for parents, guardians, caretakers and training for the new generations of decision makers.⁷⁸²

On the other hand, a number of commentators have indicated their reservation with regard to the inclusion of the principle of the best interests of the child in the CRC. In fact, some authors like Philip Alston and Bridget Gilmour-Walsh have questioned whether the principle retains its original *raison d'être* because children rights and not their mere 'interests' have been recognized in the CRC.⁷⁸³ Similarly, Margaret McCallin emphasized that the CRC guarantees children the full range of human rights and focuses on the rights of the individual child.⁷⁸⁴ In addition, she highlights that the CRC is a guide for social scientists and advocates to protect and promulgate children's and refugee children's rights.⁷⁸⁵

Nevertheless, Article 3 of the CRC⁷⁸⁶ codifies the customary norm of the 'best interests of the child' because arguably, all provisions of the CRC that have not been subject to any reservations, and article 3 of the CRC is such a text, constitute customary law, given that only two States in the world (the United States and Somalia) have not ratified the CRC and that one of them (the United States of America) has signed it, indicating its intent to abide by the CRC's provisions.⁷⁸⁷

The *travaux préparatoires* of the CRC show that the content of the best interests of the child was not discussed. However, attention was drawn to the subjectivity of the standard by the representative of Venezuela and that the ultimate interpretation of the

⁷⁸² *Ibid.*

⁷⁸³ Alston & Gilmour-Walsh, *supra* note 766 at 2

⁷⁸⁴ Margaret McCallin, "The Convention on the Rights of the Child as an Instrument to Address the Psychosocial Needs of Refugee Children" (1991) 3 Int'l J. Refugee. L. 82

⁷⁸⁵ *Ibid.* at 82-83. McCallin argues that even psychosocial needs of refugee children have to be met as part of the policy formulation to protect and enforce children's rights within the framework of the CRC and not meeting such needs of refugee children could be viewed as a form of psychological maltreatment, in which international institutions share responsibility.

⁷⁸⁶ CRC, *supra* note 22, art. 3

⁷⁸⁷ William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Thomson Canada Limited, 2007) at 81

best interests of the child would be left to the judgment of the person, institution or organization applying the standard.⁷⁸⁸

Likewise, there are criticisms that the best interests of the child is open-ended or indeterminate and that there is a problem to identify the criteria to be used to evaluate options that are open to decision-makers, who seek to act in the child's best interests.⁷⁸⁹ Robert Mnookin, one of the academics, argued against the use of the best interests of the child standard because it was too indeterminate to be of use in legal decisions. He claimed that

the phrase is so idealistic, virtuous and high sounding that it defies criticism and can delude us into believing that its application is an achievement itself. Its mere utterance can trap us into the self-deception that we are doing something effective and worthwhile. However, the flaw is that what is best for any child or even children in general is often indeterminate and speculative and requires a highly individualised choice between alternatives.⁷⁹⁰

Mnookin believed that the determination of what was 'best' or 'least detrimental' for a particular child is normally indeterminate and speculative. His view is that even if psychological theories could provide confident predictions on the effect of alternative custody dispositions, society does not have any clear-cut consensus on values to determine what is 'best' or 'least detrimental', which would make the formulation of the necessary rules even more difficult.⁷⁹¹ Mnookin referred to Lon Fuller's comment that when a judge decides about custody under the best interests principle, the judge is not applying law or legal rules but he is only exercising administrative discretion which by its nature cannot be rule-bound.⁷⁹² Moreover, the judicial decision-making process involves the judge having to choose among alternatives and selecting the one that would maximise the child's best interest. This decision-making process is to be viewed as a question of rational choice. Hence, the judge's decision could be framed in the

⁷⁸⁸ U N Doc. E / CN.4/1989/48 at para. 120, cited in Breen, *The Standard of the Best Interests of the Child*, *supra* note 757

⁷⁸⁹ Alston & Gilmour-Walsh, *supra* note 766 at 2; Detrick, *supra* note 765 at 88

⁷⁹⁰ Robert Mnookin, *In the Interests of Children* (New York: W.H. Freeman & Co., 1985)

⁷⁹¹ *Ibid.* at 229

⁷⁹² *Ibid.* at 255

intellectual tradition, viewing the decision-making process as a matter of rational choice, thereby, revealing the inherent indeterminacy of the best interests standard.⁷⁹³

Although the principle of the "best interests of the child" has received criticism because of its vagueness and indeterminacy, however, McLachlin J. of the Supreme Court of Canada has defended the continued use of this principle in *Gordon v. Goertz*,⁷⁹⁴ by stating that "[t]he best interests of the child test has been characterized as 'indeterminate' and 'more useful as legal aspiration than as legal analysis.'" She further reasoned that although multiple factors may impinge on this principle, making it inevitably indeterminate, however, a more precise test would result in sacrificing the best interests of the child to "expediency and certainty".⁷⁹⁵ Moreover, according to Canada's IRB Guidelines for Child Refugee Claimants,⁷⁹⁶ the circumstances of each case would determine the interpretation given to the best interests of the child principle since it is a very broad term. Multitude of factors such as age, gender, cultural background and past experience of the child would also make a concrete definition of this principle to be difficult.

The principle of the best interests of the child is complex and lacks a precise meaning, thereby, poses challenges in its application.⁷⁹⁷ Diverse interpretations may be given to this principle. Yet, "the principle has come to be known in one form or another to many national legal systems and has important analogues in diverse cultural, religious and other traditions".⁷⁹⁸ The best interests of the child has been incorporated in national constitutions, children's acts, family law codes and a wide range of juvenile justice laws.⁷⁹⁹ This principle can be promoted further by encouraging all relevant actors to apply the best interests principle in all pertinent legislation, policies and programmes.⁸⁰⁰

⁷⁹³ *Ibid.* at 255-256

⁷⁹⁴ *Gordon v. Goertz*, [1996] 2 S.C.R 27 at para. 20

⁷⁹⁵ *Ibid.*

⁷⁹⁶ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12 at 3

⁷⁹⁷ P. Alston, *supra* note 773

⁷⁹⁸ *Ibid.*

⁷⁹⁹ Rios-Kohn, *supra* note 754 at 46

⁸⁰⁰ *Ibid.* at 48

Notably, the Committee on the Rights of the Child, which is a monitoring body set up by the CRC,⁸⁰¹ values the fact that Canada, being one of the State party to the CRC, holds the principle of the best interests of the child to be of vital importance in the development of all legislation, programmes and policies concerning children.⁸⁰² The Committee recognizes the progress made by Canada in this respect. For instance, the Committee welcomes the incorporation of the principle of the best interests of the child in the *Immigration and Refugee Protection Act (IRPA)* through section 3(3)(f) of the *IRPA*⁸⁰³ and the continuing efforts that are being made by Canada to address the concerns of children in the immigration process, in cooperation with the Office of the UNHCR and non-governmental organizations.⁸⁰⁴ The Committee recommended that this principle to be integrated in all reviews of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programmes and services that have impact on children.⁸⁰⁵

Similarly, the Conclusion (No 47) issued by the Executive Committee of the High Commissioner's Programme stresses that all actions in relation to refugee children should be guided by the principle of the best interests of the child and addresses the special situation of unaccompanied minors.⁸⁰⁶ This is reaffirmed by the Conclusion on Refugee Children and Adolescents (No 84), which calls again on States to ensure that

⁸⁰¹ See CRC, *supra* note 22, arts. 43-44, which set up a monitoring mechanism that requires States Parties to submit reports to a body of experts (the Committee on the Rights of the Child) for its evaluation.

⁸⁰² Cynthia Price Cohen, *Jurisprudence on the Rights of the Child*, Vol. I (Ardsey: Transnational Publishers Inc., 2005) at 390 [Cohen, *Jurisprudence*, Vol. I]; UN Committee on the Rights of the Child, *Concluding Observations*, *supra* note 276

⁸⁰³ See *Immigration and Refugee Protection Act*, *supra* note 32, s. 3(3)(f); See *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341 (T.D.) (Madam Justice Simpson had stated in her judgment that section 3(3)(f) of the *IRPA* has incorporated the *Convention on the Rights of the Child* into Canadian domestic law to the extent that the *IRPA* has to be construed and applied in a manner to conform with the Convention.)

⁸⁰⁴ Cohen, *Jurisprudence*, Vol. III, *supra* note 276 at 2826; UN Committee on the Rights of the Child, *Concluding Observations*, *supra* note 276

⁸⁰⁵ Cohen, *Jurisprudence*, Vol. I, *supra* note 802 at 390; UN Committee on the Rights of the Child, UN Committee on the Rights of the Child, *Concluding Observations*, *ibid.*

⁸⁰⁶ UN EXCOM (The Executive Committee on the International Protection of Refugees), *No. 47 (XXXVIII) Conclusion on Refugee Children*, 38th Sess., (1987), online: UNHCR <<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> 85; Hunter, *supra* note 375 at 387

the best interests of the child are paramount.⁸⁰⁷ These Conclusions, though not binding, have persuasive authority.

Above all, the principle of the best interests of the child is relevant not only to determine procedural questions but also to consider substantive issues pertinent to unaccompanied children seeking refugee status. This would be in line with a liberal interpretation of an international norm, pursuant to *Vienna Convention on the Law of Treaties*.⁸⁰⁸ For instance, the best interests of the child principle is relevant to determine substantive issues such as defining the behavior that would be considered as persecution of a child, the circumstances that would give rise to a well-founded fear in a child, and the threshold that children have to meet to discharge their burden of proof.⁸⁰⁹ With this in mind, in the next part, it will be shown that the principle of the best interests of the child should be used to interpret the criteria of well-founded fear for asylum seeking unaccompanied minors.

4.2 Using Principle, Policy and Rule to interpret the Criteria of Well-Founded Fear

In this section, the proposition to redefine the criteria of well-founded fear for unaccompanied minors seeking asylum in Canada will be supported by application of Ronald Dworkin's legal theory on principle, policy and rules. It will be shown that the principle of the best interests of the child should be used to interpret the criteria of well-founded fear for asylum seeking unaccompanied minors such that a single objective

⁸⁰⁷ UN EXCOM (The Executive Committee on the International Protection of Refugees), *No. 84 (XLVIII) Conclusion on Refugee Children and Adolescents*, 48th Sess., (1997), online: UNHCR < <http://www.unhcr.org/publ/PUBL/41b041534.pdf> > 186; Hunter, *ibid*.

⁸⁰⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, arts. 31 and 32; See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 51-52

⁸⁰⁹ See Bhabha & Young, *supra* note 140 at n. 53: The drafters of the INS Guidelines (U.S.) for Children adopted this approach initially, as seen in their Draft Guidelines 14 which state that the 'need for sensitive treatment of child asylum-seekers extends not only to interviewing techniques but also to the legal analysis of a child's claim'. Nevertheless, the final INS Guidelines retract from this position and limit the best interests of the child principle to procedural and evidentiary questions, affirming without explanation that this principle does not play a role to determine substantive eligibility under the United States refugee definition (see INS Guidelines at 2). Bhabha and Young note that this position directly contradicts the obligation in article 22 of the CRC to 'protect and assist'.

element has to be considered in the assessment of well-founded fear in refugee determination hearings.

In Dworkin's view, a complete account of judicial reasoning will include something other than rules; it will also include principles.⁸¹⁰ Principles in their broad sense mean "standards other than rules" which are used by lawyers and judges in decision making.⁸¹¹ Dworkin identifies two types of such standard: policies and principles in the narrow sense.⁸¹² A policy is defined as a "standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)".⁸¹³ For instance, an example of a policy would be "the standard that automobile accidents are to be decreased".⁸¹⁴

On the other hand, principle in the narrow sense is defined as a "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".⁸¹⁵ An example of a principle would be "no man may profit by his own wrong".⁸¹⁶

According to Dworkin, a principle is a legal principle if it forms a part of the soundest theory of law that could be offered as a justification for the established legal rules and institution.⁸¹⁷ The soundest theory is not a personal opinion of judges but a determination of what is the principle coming from the current practice of law in the society.

⁸¹⁰ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 22

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

⁸¹⁴ *Ibid.*

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ Geneviève Cartier, *Coursepack: DRT-771- Les différents cadres d'analyse en droit* (Faculty of Law, Université de Sherbrooke, 2006)

The best interests of the child is a legal principle for the following reasons: First, the Supreme Court of Canada looked to the CRC⁸¹⁸ as evidence that the ‘best interests of the child’ is in indeed an established legal principle.⁸¹⁹ The Court stated that a legal principle contrasts with “the realm of general public policy”.⁸²⁰ Second, Dworkin explained that arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.⁸²¹ Furthermore, Dworkin affirmed that arguments of principle are arguments intended to establish an individual right.⁸²² Following this reasoning, the principle of the best interests of the child secures individual or group right for children.

Moreover, the best interests of the child is a legal principle because it forms a part of the soundest theory of law that could be offered as a justification for the established legal rules and institution. For instance, “[m]any Canadian statutes name the best interests of the child as a legal consideration” and “[f]amily law statutes are saturated with references to the “best interests of the child” as a legal principle of paramount importance”.⁸²³ In addition to reaffirming that the “best interests of the child principle is an established legal principle in international law and domestic law”, the Supreme Court of Canada also concluded that the “best interests of the child... carries great power in many contexts”.⁸²⁴ Furthermore, as noted by the Committee on the Rights of the Child, Canada holds the principle of the best interests of the child to be of vital importance in the development of all legislation, programmes and policies concerning children.⁸²⁵ Being a customary norm,⁸²⁶ the best interests of the child

⁸¹⁸ CRC, *supra* note 22

⁸¹⁹ *Canadian Foundation*, *supra* note 424 at para. 9

⁸²⁰ *Ibid.*

⁸²¹ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 82 and 90

⁸²² *Ibid.* at 82 and 90

⁸²³ *Canadian Foundation*, *supra* note 424 at para. 9

⁸²⁴ *Ibid.*

⁸²⁵ Cohen, *Jurisprudence*, Vol. I, *supra* note 802 at 390. See UN Committee on the Rights of the Child, *Concluding Observations*, *supra* note 276

⁸²⁶ Article 3 of the CRC codifies the customary norm of the ‘best interests of the child’ because arguably, all provisions of the CRC that have not been subject to any reservations, and article 3 of the CRC is such a text, constitute customary law, given that only two States in the world (the United States and Somalia)

principle, therefore, comes from the current practice of society, thereby making itself out as the soundest theory of law.

As noted by the Committee on the Rights of the Child, there is no national policy on unaccompanied asylum seeking children in Canada.⁸²⁷ Therefore, decision on asylum cases of unaccompanied minors in Canada should be generated by principle and not by policy. Moreover, due to the absence of a national policy on asylum seeking unaccompanied minors, the principle of the best interests of the child could be used to determine their refugee status in their refugee determination hearings.

According to the section 3(3)(f) of the *IRPA*,⁸²⁸ the *IRPA* has to be construed and applied in a manner complying “with international human rights instruments to which Canada is signatory”. Furthermore, in *Martinez v. Canada (Minister of Citizenship and Immigration)*,⁸²⁹ Madam Justice Simpson had stated in her judgement that section 3(3)(f) of the *IRPA* has incorporated the *Convention on the Rights of the Child* into Canadian domestic law to the extent that the *IRPA* has to be construed and applied in a manner to conform with the Convention. Therefore, the “well-founded fear” in section 96 of the *IRPA* can be construed and applied in a manner to comply with the best interests of the child contained in article 3(1) of the CRC,⁸³⁰ which is an international human rights instruments, signed and ratified by Canada.

Accordingly, the best interests of the child could be used to interpret a single objective element for the “well-founded fear” for unaccompanied minors seeking asylum in Canada, respecting their special needs and vulnerability of not being able to

have not ratified the CRC and that one of them (the United States of America) has signed it, indicating its intent to abide by the CRC’s provisions: See Schabas & Beaulac, *supra* note 787 at 81.

⁸²⁷ Cohen, *Jurisprudence*, Vol. III, *supra* note 276 at 2826; UN Committee on the Rights of the Child, *Concluding Observations*, *supra* note 276

The IRB Guidelines on *Child Refugee Claimants: Procedural and Evidentiary Issues* in Canada is not a national policy and so it is not considered as such by the Committee on the Rights of the Child. See also Elgersma, *supra* note 502 (“Advocates such as NGOs and United Nations bodies have recommended that Canada introduce a national policy on unaccompanied and separated children”).

⁸²⁸ *Immigration and Refugee Protection Act*, *supra* note 32, s.3(3)(f)

⁸²⁹ *Martinez*, *supra* note 803, Simpson J.

⁸³⁰ CRC, *supra* note 22, art. 3

satisfy the required subjective element in section 96 of the *IRPA*.⁸³¹ This would also be in line with the objectives of the *IRPA*⁸³² to fulfil Canada's international legal obligation with respect to refugees,⁸³³ particularly the unaccompanied minors, as well as giving them fair consideration.⁸³⁴ Above all, the principle of the best interests of the child "operates as an interpretative aid, broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms".⁸³⁵

Equally important, Dworkin had implied that judges have discretion in clear and hard cases to apply principles. To illustrate this, Dworkin gave an example of *Riggs v. Palmer*⁸³⁶ where the issue was whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so.⁸³⁷ The Court in that case used the principle "[n]o one shall be permitted...to take advantage of his own wrong" to arrive at a decision.⁸³⁸ However, it is important to note that *Riggs v. Palmer* was not a hard case. Dworkin elaborated, using this case that even in clear cases judges do not always use the existing rules, but use principles to decide the case.⁸³⁹ This raises a question as to why the criteria of well-founded fear of

⁸³¹ See *Jarada*, *supra* note 63 at paras. 23 and 27 ("A careful reading of section 96 of the *IRPA* indicates that the burden on refugee claimants is twofold: they must show by their conduct and actions that they really do fear persecution in their country, and that the fear is based on objective and verifiable evidence" at para. 23. "[T]here are objective and subjective components to section 96" at para. 27).

⁸³² *Immigration and Refugee Protection Act*, *supra* note 32, s. 3(2). This section gives the objectives of the *IRPA* with respect to refugees.

⁸³³ *Ibid.*, s. 3(2)(b)

⁸³⁴ *Ibid.*, s. 3(2)(c)

⁸³⁵ Bhabha & Young, *supra* note 140 at n. 54. Moreover, Bhabha and Young note that for majority of cases on unaccompanied minors seeking asylum, taking into consideration the minors' immediate protection needs and their future legal status and standard of living, it will be in their best interests to be granted refugee status. Nevertheless, the scope of the refugee definition is narrower than a decision based on the best interests of the child. Although the best interests considerations should "inform the factors weighed and the procedures adopted in refugee cases, they do not determine the outcome" at n. 54.

⁸³⁶ *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889)

⁸³⁷ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 23

⁸³⁸ *Ibid.*; *Riggs v. Palmer*, *supra* note 836 at 511, 22 N.E. at 190

⁸³⁹ See e.g. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 R.C.S. 519 at para. 149. Sopinka J. applied the principle of 'sanctity of life' from section 7 of the Charter to decide the case, even though there was an existing law, which is section 241(b) of the Criminal Code. The Court wrote that the long-standing blanket prohibition in s. 241(b) of the Criminal Code, which fulfils the government's objective of protecting the vulnerable, is grounded in the state interest in protecting life and reflects the policy of the

persecution could not be redefined, to consist of a single objective element, in the case of unaccompanied minors seeking asylum in Canada, using the best interests of the child principle for the benefit of children's protection, even if there is a clear existing rule of how to interpret the criteria of well-founded fear.

According to Dworkin, Hart's view (that law consists only of rules) implies that there is not enough law to cover all cases.⁸⁴⁰ There are numerous "gaps" in the law in which judges have to use their discretion.⁸⁴¹ When a judge encounters a case that is not covered by an existing rule, he or she has discretion as to what decision to make, in effect making new law.⁸⁴² When they do this, judges behave as "deputy to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem."⁸⁴³

But if Dworkin's principles are recognized, then it seems there is an abundance of law and far fewer "gaps" in the law in which judges have to use their discretion.⁸⁴⁴ However, this does not mean that judicial reasoning is a simple matter. Identifying which principles ought to be applied in a given case is no easy task. One way in which it is difficult is that in a given case, one principle might favor making one decision, while a different principle might favor making another.⁸⁴⁵ What happens when there are competing principles, principles that pull in different directions for a given case? For instance, there is a principle that automobile manufacturers must be held to higher standards than other manufacturers, and there is a competing principle that competent individuals have a basic freedom to enter into binding contracts.⁸⁴⁶

state that human life should not be depreciated by allowing life to be taken. This state policy is part of the fundamental conception of the sanctity of life.

⁸⁴⁰ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 82

⁸⁴¹ *Ibid.*

⁸⁴² *Ibid.*

⁸⁴³ *Ibid.*

⁸⁴⁴ Lane, *supra* note 70

⁸⁴⁵ *Ibid.*

⁸⁴⁶ See Dworkin, *Taking Rights Seriously*, *supra* note 810 ("*Henningsen* argument – that automobile manufacturers must be held to higher standards than other manufacturers, and are less entitled to rely on the competing principle of freedom of contract" at 26).

To understand what happens in the case of competing principles, Dworkin's view is to consider the following: Rules are "all-or-nothing"; where either the facts of a given case fall under a given rule (the rule definitely applies) or they do not (the rule definitely does not apply); where they are like the rules of, for example, baseball which state that "three strikes and you're out" allowing for no exceptions.⁸⁴⁷ On the other hand, principles are not "all-or-nothing".⁸⁴⁸ Rather, they have "weight," and weight comes in degrees.⁸⁴⁹ This means that principles come in varying degrees of importance.⁸⁵⁰ For this reason, Dworkin explains that "[p]rinciples have a dimension that rules do not – the dimension of weight or importance".⁸⁵¹ This makes it possible to compare one principle against another and ask which is the more important when they come into conflict and one must supersede the other. For this reason, Dworkin states that:

When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.⁸⁵²

Furthermore, Dworkin emphasized that a judge has to evaluate the weight and importance of principles, by saying that "[i]f a judge believes that principles he is bound to recognize point in one direction and that principles pointing in the other direction, if any, are not of equal weight, then he must decide accordingly".⁸⁵³ Following this rationale, the best interests of the child principle has to be weighed with other principles. Thus, only a principle with greater weight could prevent the principle of the best interests of the child from interpreting the criteria of well-founded fear of persecution for unaccompanied minors seeking asylum in Canada.

⁸⁴⁷ *Ibid.* at 24

⁸⁴⁸ *Ibid.* at 25

⁸⁴⁹ *Ibid.* at 26

⁸⁵⁰ *Ibid.*

⁸⁵¹ *Ibid.*

⁸⁵² *Ibid.* at 26-27

⁸⁵³ *Ibid.* at 35

On the other hand, Dworkin argued that “[w]e make a case for a principle, and for its weight, by appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings”.⁸⁵⁴ Using this rationale, a case for the principle of best interests of the child can be made by looking at the *travaux préparatoires* of the CRC to see the appeals to community practices and understandings. The Principle II of the 1959 *Declaration on the Rights of the Child*, which was the first international document on the best interests of the child and which inspired the adoption and implementation of the CRC, provided the standard of the best interests of the child as follows:

[T]he child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop, physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.⁸⁵⁵

Therefore, being the paramount consideration in the legislative history of the CRC and figuring the appeals of community practices and understandings, the principle of the best interests of the child could be used to interpret the criteria of well-founded fear for unaccompanied minors seeking asylum in Canada.

Equally important, to illustrate that a principle is binding upon judges, Dworkin inquired if “[i]t is always a question whether any particular principle is in fact binding upon some legal official”.⁸⁵⁶ He reasoned that “there is nothing in the logical character of a principle that renders it incapable of binding him”.⁸⁵⁷ According to Dworkin, it cannot be said that the court is only ‘morally’ obligated to take particular principles into account.⁸⁵⁸ Therefore, following this reasoning, it can be argued that the principle of the

⁸⁵⁴ *Ibid.* at 36

⁸⁵⁵ *Declaration of the Rights of the Child*, GA Res. 1386 (XIV), UN GAOR, 14th Sess., Supp. No. 16, UN Doc. A/4059 (20 November 1959)

⁸⁵⁶ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 35

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *Ibid.*; See also Richard W. Bauman, “Principles, Policies and Persuasion” in E Bilson H Dumont & GA Smith, eds, *Justice to Order: Adjustment to Changing Demands and Co-ordination Issues in the Justice System in Canada* (Montréal: Les Éditions Thémis for the Canadian Institute for the Administration of Justice, 1999) 139 (According to Dworkin, judges should confine themselves to principles. One of the rationales is that “[t]he virtue of the system of unelected judges is that they are insulated from the pressures of satisfying a political majority and therefore they are in a better position to evaluate the argument of principle” at 151).

best interests of the child could be considered to interpret the criteria of well-founded fear of persecution for unaccompanied minors seeking refugee status in Canada.

Next, to illustrate when a judge is permitted to change an existing rule of law, Dworkin affirmed that it would be, firstly, when “the change would advance some principle”.⁸⁵⁹ For instance, in *Riggs v. Palmer*,⁸⁶⁰ the change, which was a new interpretation of the statute of wills, was justified by the principle that no man should profit from his own wrong.⁸⁶¹ By this example, Dworkin emphasized that “there must be some principles that count for more than others”.⁸⁶² This means that a principle with greater weight and importance will be chosen. Secondly, Dworkin argued that a judge proposing to change an existing doctrine (i.e. a rule of law) must take into account principles like ‘legislative supremacy’, doctrine of precedent “that argue against departures from established doctrine”.⁸⁶³

Following the doctrine of precedent in Canadian jurisprudence, it can be argued that the best interests of the child could be used to interpret the well-founded fear of persecution, to be consisting of a single objective element, for unaccompanied minors in Canada. For instance, in *Zhu v. Canada*, the Federal Court of Canada reaffirmed that “[t]he IRB Guidelines on Child Refugee Claimants provide that in determining the child’s fear of persecution, international human rights instruments should be considered in determining whether the harm which the child fears amounts to persecution.”⁸⁶⁴ This case shows that international human rights instruments such as the CRC⁸⁶⁵ should be considered in determining the well-founded fear of persecution for asylum seeking children.

⁸⁵⁹ Dworkin, *Taking Rights Seriously*, *ibid.* at 37

⁸⁶⁰ *Riggs v. Palmer*, *supra* note 836

⁸⁶¹ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 37

⁸⁶² *Ibid.*

⁸⁶³ *Ibid.*

⁸⁶⁴ *Zhu*, *supra* note 259 at para. 18

⁸⁶⁵ See Moushira Khattab, “Progress and challenges for the Committee on the Rights of the Child in monitoring the implementation of the CRC by governments,” *Making Children’s Rights Work: National and International Perspectives*, IBCR Conference, Montreal, 19 November 2004 (“[T]he universal ratification of the Convention [Convention on the Rights of the Child] is a great achievement, whereby all states but two have ratified it. With a growing perception of children as people with rights, we witness

In another landmark case, *Baker v. Canada*,⁸⁶⁶ the Supreme Court of Canada had affirmed that the principles of the CRC placed “special importance on the protections for children and childhood and on particular consideration” of children’s interests, needs and rights. In this case, the majority of the Court confirmed the application of article 3 of the CRC in Canadian law, at least for the purposes of interpretation of Canadian statutes.⁸⁶⁷ Justice L’Heureux-Dubé emphasized that “[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute...Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”.⁸⁶⁸ Therefore, the values reflected in the CRC, especially the best interests of the child principle, could help inform the contextual approach to statutory interpretation of the phrase ‘well-founded fear’ contained in section 96 of the *IRPA*.

Moreover, in *Winnipeg Child and Family Services v. K.L.W.*, Justice L’Heureux-Dubé, speaking for the majority of the Court, invoked the CRC’s ratification by 191 states, including Canada, to affirm that “protecting children from harm has become a universally accepted goal.”⁸⁶⁹ Given that Canada has ratified the CRC⁸⁷⁰ and that section 3(3)(f) of the *IRPA* has incorporated the CRC such that the *IRPA* has to be construed

transformation of public policy in Member States from being needs-based to rights-based.”); See Jean-Pierre Rosenczveig, “Welcoming Remarks,” *Making Children’s Rights Work: National and International Perspectives*, IBCR Conference, Montreal, 18 November 2004 (Convention on the Rights of the Child is referred as “Charter on the Rights of the Child”)

⁸⁶⁶ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para. 71 [*Baker*]

⁸⁶⁷ *Ibid.* (In this case, the Supreme Court of Canada raised the issue of application of the best interests of the child principle to circumscribe the discretion exercised by immigration officials when making decisions on the basis of compassionate and humanitarian grounds.)

⁸⁶⁸ *Baker*, *supra* note 866 at paras. 69-70

⁸⁶⁹ *Winnipeg Child & Family Services*, *supra* note 425 at para. 73

⁸⁷⁰ See Renée Joyal, Jean-François Noël & Clara Chapdelaine Feliciati, eds., *Final Report of the Conference held in Montreal on November 18-20, 2004: Making Children’s Rights Work: National and International Perspectives* (Québec: Les Éditions Yvon Blais Inc., 2005) at 29-31. (The participants at this Conference discussed the legal status of the CRC in Canada and touched on the possibility of entrenching the CRC into the Canadian Constitution); See also Jutta Brunnée & Stephen J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts”, (2002) 40 *The Canadian Yearbook of Int’l Law* 3 (According to Professors Brunnée and Toope, once Canada has ratified a treaty, it has engaged its international responsibility. Therefore, judges should give effect to ratified international conventional law, regardless of whether it has been legislatively incorporated into domestic law, and interpret Canadian law in a manner that is consistent with the standards contained in the treaties).

and applied to conform with the CRC,⁸⁷¹ the ‘well-founded fear’ in section 96 of the *IRPA* can be construed and applied to comply with the best interests of the child contained in article 3(1) of the CRC. Accordingly, Canada could protect unaccompanied minors from harm and denial of refugee protection by interpreting ‘well-founded fear’ to consist of objective fear only for these minors. Such interpretation would be in the best interests of these asylum seeking minors.⁸⁷² The best interests of the child as an internationally recognized guiding principle for refugee children can be a useful measure to play a role not only in procedural questions in Canadian refugee law but also in substantive asylum law in Canada.⁸⁷³

Therefore, analyzing the doctrine of precedent, as explained by Dworkin, in Canadian jurisprudence, it is clear that article 3(1) of the CRC⁸⁷⁴ on the best interests of the child principle could be considered to interpret the criteria of well-founded fear of persecution for unaccompanied minors seeking refugee status in Canada.⁸⁷⁵ Accordingly, a single objective element can be adopted to assess the well-founded fear, in the best interests of the asylum seeking unaccompanied minors, instead of the traditional two elements requirement in the criteria of well-founded fear in section 96 of the *IRPA*.⁸⁷⁶

⁸⁷¹ See *Martinez*, *supra* note 803, Simpson J.; See *Immigration and Refugee Protection Act*, *supra* note 32, s. 3(3)(f)

⁸⁷² Due to their age, immaturity and special vulnerability, unaccompanied minors may be unable to express subjective fear and as a result, they may fail at refugee determination hearings.

⁸⁷³ *Contra* INS GUIDELINES, *supra* note 137 at 2, where it is indicated that “[t]he internationally recognized guiding principle for refugee children is “best interests of the child”. It is a useful measure for determining appropriate interview procedures for child asylum seekers, but does not play a role in determining substantive eligibility under the U.S. refugee definition.”

⁸⁷⁴ CRC, *supra* note 22, art. 3

⁸⁷⁵ Section 3(3)(f) of the *IRPA* has incorporated the *Convention on the Rights of the Child* into Canadian domestic law to the extent that the *IRPA* has to be construed and applied in a manner to conform with the Convention. Thus, the ‘well-founded fear’ in section 96 of the *IRPA* has to be interpreted to conform with article 3 of the CRC. See also Brunnée & Toope, *supra* note 870 (Once Canada has ratified a treaty, it has engaged its international responsibility. Therefore, judges should give effect to ratified international conventional law, regardless of whether it has been legislatively incorporated into domestic law, and interpret Canadian law in a manner that is consistent with the standards contained in the treaties.)

⁸⁷⁶ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96; See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27)

4.3 Strategy on Distinction between Substance and Process

In this part, through a brief discussion on Dworkin's theory to distinguish between matters of substance and matters of process, it will be shown why judges have to make substantive political decisions to redefine the criteria of well-founded fear, to be consisting of a single objective element, in section 96 of the *IRPA* for unaccompanied minors seeking refugee status in Canada.

Dworkin introduces a strategy which relies “on a sharp distinction between matters of substance and matters of process”.⁸⁷⁷ Dworkin explains that if judges were to take up the assignment not to review fairness or justice of substantive decisions made by officials who enacted the statutes under review but only to protect the fairness of the process through which these statutes were made, then judges would not be trespassing on substantive decisions and they would only follow their convictions about the fairness of the process.⁸⁷⁸ Applying this strategy of Dworkin to section 96 of *IRPA*,⁸⁷⁹ judges would not consider the fairness or justice of using the same criteria of well-founded fear, which consists of subjective fear and objective fear, for adult refugee claimants and unaccompanied minors seeking asylum in Canada. Rather, judges would only protect the fairness of the process through which the *IRPA* was made. The most, they would be protecting procedural safeguard for unaccompanied minors seeking refugee status in Canada because “[i]n determining the procedures to be followed when considering the refugee claim of a child, the CRDD [Convention Refugee Determination Division of the IRB] should give primary consideration to the ‘best interests of the child’”.⁸⁸⁰

Therefore, judges have to make substantive political decisions to redefine the criteria of well-founded fear, to be consisting of a single objective element, in section 96 of the *IRPA* for unaccompanied minors seeking refugee status in Canada. In other words, judges have to review the fairness of using the same criteria of well-founded fear in section 96 of the *IRPA* for adults and unaccompanied minors seeking asylum in

⁸⁷⁷ Dworkin, *A Matter of Principle*, *supra* note 71 at 34

⁸⁷⁸ *Ibid.*

⁸⁷⁹ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

⁸⁸⁰ IRB, *Child Refugee Claimants: Procedural and Evidentiary Issues*, *supra* note 12 at 3

Canada, so as to review the fairness or justice of substantive decisions made by officials who enacted section 96 of the *IRPA*.

4.4 Constructive Interpretation justifies a Single Objective Element

Next, the proposition, to redefine the criteria of well-founded fear of persecution for unaccompanied minors seeking asylum in Canada, will be reaffirmed using Dworkin's legal theory on constructive interpretation. Dworkin developed constructive interpretation most fully in his book *Law's Empire*.⁸⁸¹

Both the practice of law and legal theory involve 'constructive interpretation', which is much like the work of a literary critic interpreting a work of literature.⁸⁸² According to Dworkin, "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong".⁸⁸³ Dworkin argues that social explanation and art criticism have to be considered on constructive interpretation. For this reason, he said that "[i]nterpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause".⁸⁸⁴ But Dworkin added that the purposes are not fundamentally those of the author but of the interpreter.⁸⁸⁵

Dworkin's constructive interpretation can be understood with examples such as looking at stars and "seeing" a constellation in the form of a mythic figure; or looking at points on a graph and "seeing" a line that explains the data in terms of a correlation between variables.⁸⁸⁶ Likewise, applying Dworkin's constructive interpretation, in jurisprudence, the "object" to be constructively interpreted includes past judicial decisions and the reasoning given to support them, statutes passed by legislatures, and

⁸⁸¹ Ronald Dworkin, *Law's Empire* (London: The Belknap Press of Harvard University Press, 1986)

⁸⁸² Lane, *supra* note 70

⁸⁸³ Dworkin, *Law's Empire*, *supra* note 881 at 52

⁸⁸⁴ *Ibid.*

⁸⁸⁵ *Ibid.*

⁸⁸⁶ Lane, *supra* note 70

texts of constitutions.⁸⁸⁷ These are data to be explained, to be accommodated in a coherent “picture.”⁸⁸⁸

Dworkin implies that a judge must sometimes choose between competing interpretations, each of which “fits” the data to some degree. In choosing between competing interpretations, he or she must consider both: a) how well each fits (both might fit, but one might fit better than the other, i.e. might be more consistent with all the data); b) which one has the greater moral value.⁸⁸⁹ In some areas of law, for instance in estate law and property law, whether a decision fits better may be more important than its moral value.⁸⁹⁰ In other areas of law concerning civil liberties, fit may be less important than moral value.⁸⁹¹ Using this analogy, in refugee law, children are at risk of denial of refugee protection due to their vulnerability and age, and thus, their right to security is at stake. Choosing an interpretation of the criteria of well-founded fear to be consisting of subjective fear and objective fear may fit past judicial decisions and the reasoning given to support them, statutes passed by legislatures, and texts of constitutions. However, in refugee law where fundamental rights and civil liberties are at stake, fit may be less important than moral value. Therefore, by adopting the criteria of well-founded fear, to be consisting of a single objective element exclusively, for unaccompanied children seeking asylum, such an interpretation would ensure a greater moral value.

For instance, “it is in society’s best interests for the law to make the child’s needs paramount over those of any adult”.⁸⁹² This is because children differ from adults in their mental nature, their functioning, their understanding of events and their reaction to these events. In fact, it is noted that unaccompanied minors are distinct from adult refugee claimants⁸⁹³ and that “protecting children from harm has become a universally

⁸⁸⁷ *Ibid.*

⁸⁸⁸ *Ibid.*

⁸⁸⁹ *Ibid.*

⁸⁹⁰ *Ibid.*

⁸⁹¹ *Ibid.*

⁸⁹² Breen, *The Standard of the Best Interests of the Child*, *supra* note 757 at 46.

⁸⁹³ See Judith Wouk *et al*, “Unaccompanied Minors and Refugee Protection in Canada”, *supra* note 753

accepted goal.”⁸⁹⁴ Therefore, interpreting objective fear only for the ‘well-founded fear’ in section 96 of the *IRPA* for unaccompanied minors would consider their special needs in refugee determination and ensure greater moral value being pursued.

Indeed, in Dworkin’s view, for nearly all legal questions, there is a unique right answer, a best interpretation.⁸⁹⁵ Thus, adopting a single objective element for the criteria of well-founded fear, in the case of unaccompanied minors seeking asylum in Canada, would result in a best interpretation, considering their plight and vulnerability.

4.5 The Rule of Law: Rule-book Conception and Rights Conception

Next, the proposition, to redefine the criteria of well-founded fear of persecution for unaccompanied minors seeking asylum in Canada, will be defended by discussing Dworkin’s two conceptions of the rule of law: “rule-book” conception and “rights” conception.⁸⁹⁶

According to Dworkin, there are two different conceptions of the rule of law.⁸⁹⁷ The first is “rule-book” conception, which “insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all”.⁸⁹⁸ According to this conception, citizens and government must abide by the public rules until they are changed accordingly with further rules about how they are to be changed, which are also stated in the rule book.⁸⁹⁹ Nevertheless, the rule-book conception does not stipulate anything about the content of the rules that may be included in the rule book.⁹⁰⁰ People with this conception do not care about the content of the rules in the rule book and they

⁸⁹⁴ *Winnipeg Child & Family Services*, *supra* note 425 at para. 73

⁸⁹⁵ Lane, *supra* note 70

⁸⁹⁶ Dworkin, *A Matter of Principle*, *supra* note 71 at 11

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*

⁸⁹⁹ *Ibid.*

⁹⁰⁰ *Ibid.*

say that this is a matter of substantive justice, which is an independent ideal and not part of the ideal of the rule of law.⁹⁰¹

The second conception of the rule of law is the “rights” conception.⁹⁰² This conception assumes that “citizens have moral rights and duties with respect to one another, and political rights against the state as a whole”.⁹⁰³ The rights conception insists that “these moral rights and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions...so far as this is practicable”.⁹⁰⁴ The rule of law with this conception does not distinguish between the rule of law and substantive justice, but requires that the rules in the rule book enforce moral rights.⁹⁰⁵

Following the rule-book conception, the definition of refugee provided in section 96 of the *IRPA*⁹⁰⁶ sets out the requirement to prove well-founded fear of persecution to qualify as a refugee. However, as rule book conception does not stipulate anything about the content of the rules, which is a matter of substantive justice, therefore, the content of the criteria of well-founded fear of persecution is not set out in the *Immigration and Refugee Protection Act (IRPA)*.⁹⁰⁷ The jurisprudence⁹⁰⁸ stipulates the criteria of well-founded fear as containing both objective and subjective elements (i.e. subjective fear and objective fear). Therefore, it can be assumed that section 96 of the *IRPA*, using the traditional criteria of well-founded fear, which applies to adult refugee claimants and unaccompanied minors, follows the rule-book conception.

Following the “rights” conception, moral rights and political rights of citizens must be recognized in positive law so that they can be enforced in judicial institutions by demand of individuals. A child has a right to equality which is a moral right.

⁹⁰¹ *Ibid.*

⁹⁰² *Ibid.*

⁹⁰³ *Ibid.*

⁹⁰⁴ *Ibid.*

⁹⁰⁵ *Ibid.* at 12

⁹⁰⁶ *Immigration and Refugee Protection Act*, *supra* note 32, s. 96

⁹⁰⁷ Judges follow what is set out according to the rule-book.

⁹⁰⁸ See *Ward*, *supra* note 31 at paras. 58-59; *Chan*, *supra* note 100 at paras. 4 and 134; See *Jarada*, *supra* note 63 (“There are subjective and objective components to section 96 [of the *IRPA*]” at para. 27)

Unaccompanied minors seeking refugee status in Canada should be treated with different criteria of well-founded fear from adults so as to recognize a child's right to equality, by recognizing the differences between adults and children and drawing valid distinctions between the two groups. Therefore, a law, having different criteria of well-founded fear, to be consisting of objective fear only, for unaccompanied minors, would follow the rights conception, enforcing moral rights such as equality right for unaccompanied children.

According to Dworkin, the rule-book conception of the rule of law "has only one dimension along which a political community might fall short. It might use its police power over individual citizens otherwise than as the rule book specifies".⁹⁰⁹ In Dworkin's view, the rights conception has at least three dimensions of failure.⁹¹⁰ Firstly, "a state might fail in the scope of the individual rights it purports to enforce...though it concedes citizens have such rights".⁹¹¹ Here, for example, Canada has obligations to enforce equality rights and the best interests of the child.⁹¹² However, Canada might fail in its obligations by not recognizing the rights conception of the rule of the law for the definition of 'refugee' in section 96 of the *IRPA* for unaccompanied minors to prove their well-founded fear with different criteria, namely, a single objective element for the 'well-founded fear'.

According to Dworkin, the second dimension of failure under the rights conception for a political community is that a state "might fail in the *accuracy* of the rights it recognizes: it might provide for rights against the state, but through official mistake fail to recognize important rights".⁹¹³ Accordingly, Canada by not having different criteria of well-founded fear in the case of unaccompanied minors seeking asylum, failed to recognize equality rights for children.

In Dworkin's view, the third dimension of failure under the rights conception for a political community is that a state "might fail in the *fairness* of its enforcement of

⁹⁰⁹ Dworkin, *A Matter of Principle*, *supra* note 71 at 12

⁹¹⁰ *Ibid.*

⁹¹¹ *Ibid.*

⁹¹² *Charter*, *supra* note 58, s. 15; *Canadian Foundation*, *supra* note 424 at para. 9

⁹¹³ Dworkin, *A Matter of Principle*, *supra* note 71 at 12

rights: it might adopt rules that put the poor or some disfavored race at a disadvantage in securing the rights the state acknowledges they have”.⁹¹⁴ Accordingly, by adopting a definition of refugee to prove well-founded fear of persecution, equally for adults and children, unaccompanied minors are at great disadvantage to prove their well-founded fear of persecution to qualify for refugee status in Canada. Hence, Canada fails in the fairness of its enforcement of rights such as equality rights.

Although the two conceptions of the rule of law, namely, the rule-book conception and the rights conception, compete as ideals of the legal process, “they are nevertheless compatible as more general ideals for a just society”.⁹¹⁵ Dworkin warns that a government’s compliance with the rule book is not sufficient for justice because full compliance will achieve great injustice if the rules are unjust.⁹¹⁶ Therefore, a refugee definition with the same criteria of well-founded fear for adults and unaccompanied minors to qualify for refugee status would result in having unjust rules.⁹¹⁷

Finally, Dworkin argues that “a society that achieves a high rating on each of the dimensions of the rights conception is almost certainly a just society, even though it may be mismanaged or lack other qualities of a desirable society”.⁹¹⁸ Accordingly, in Canada, adopting a new law for a definition of refugee or modifying section 96 of the *IRPA* to consist of a single objective element for ‘well-founded fear’ in the case of unaccompanied minors would follow the rights conception, enforcing moral rights such as equality rights for minors. This would ensure a just society for Canada.

4.6 Right to Equality and Reverse Discrimination justify a Single Objective Element

⁹¹⁴ *Ibid.*

⁹¹⁵ *Ibid.*

⁹¹⁶ *Ibid.*

⁹¹⁷ For this reason, a single objective element has to be used for the ‘well-founded fear’ in section 96 of the *IRPA* for unaccompanied minors seeking asylum in Canada.

⁹¹⁸ Dworkin, *A Matter of Principle*, *supra* note 71 at 12

While human beings have natural rights, one right, which is the right to equality, is fundamental to others.⁹¹⁹ Dworkin describes this right as the right to be accorded “respect, dignity and equal consideration”.⁹²⁰ This right arises because human beings are moral persons and possess this right as part of their nature.⁹²¹ Dworkin attacks his critics who would argue that equality is the enemy of liberty.⁹²² According to Dworkin, liberty comes from fundamental right of equality, which in turn gives it substance.⁹²³ It is essential to note that the achievement of equality in rights protection between children and adults will have to recognize the difference between children and adults where such difference is based on the drawing of valid distinctions between the two groups.⁹²⁴ Therefore, unaccompanied minors seeking asylum should not be held to the same criteria of well-founded fear as adults.⁹²⁵

Moreover, Dworkin opposes Bentham’s utilitarianism on the ground that the primacy of individual rights cannot allow the surrender of the individual to the decision of the majority regarding the common good.⁹²⁶ Dworkin attacks the theory of legal positivism advanced by H.L.A Hart which takes as given the existing rules “recognized by a community of individuals making up the state”.⁹²⁷ Here, Dworkin’s concern is that such rules are based on policy and not on moral principles and therefore, they give no essential importance to an individual’s right of “equal concern and respect”.⁹²⁸ This further illustrates why the principle of the best interests of the child has to be considered to achieve equality rights for children.

⁹¹⁹ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 150-83

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² Kenneth H. Fogarty, *Equality Rights and their Limitations in the Charter* (Toronto: Carswell, 1987) at 18

⁹²³ *Ibid.* at 18-19

⁹²⁴ Breen, *Age Discrimination*, *supra* note 232 at 12

⁹²⁵ Furthermore, the legitimacy of limits on the rights of the child has traditionally been measured by the standard of the best interests of the child: See *ibid.* Therefore, the criteria of well-founded fear have to be redefined, to be consisting of a single objective element, in section 96 of the *IRPA* for unaccompanied minors seeking asylum in Canada, using the principle of the best interests of the child.

⁹²⁶ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 94-100, 199, 232-38

⁹²⁷ *Ibid.* at 7-28

⁹²⁸ *Ibid.*

Next, those who may want to argue against a change in the criteria of well-founded fear, for unaccompanied children seeking asylum, might defend their position by claiming that it would be a discrimination against adults if adults and unaccompanied children are treated with a different criteria. As a response to this argument, the theory of Dworkin on reverse discrimination arising out of affirmative action program considered in *DeFunis v. Odegaard*⁹²⁹ will be discussed.⁹³⁰ In this case, DeFunis had applied for admission to study law at the University of Washington Law School.⁹³¹ He was rejected although his test scores and grades were such that he would have been admitted if he had been a black, a Filipino, a Chicano or an American Indian.⁹³² Before the case reached the United States Supreme Court, the appellant had been admitted to the law school and graduated.⁹³³ Eventually, the Supreme Court dismissed the appeal, considering the case moot.⁹³⁴ However, Justice Warren, as a dissenting opinion, supported DeFunis' claim on the merits and disagreed with the neutral position of the majority.⁹³⁵

However, Dworkin argued that the affirmative action program of the University of Washington Law School was defensible and that the discrimination against DeFunis was justifiable.⁹³⁶ Here, he argued that equality was the key right. However, Dworkin stressed that the appropriate concept of equality must be used. His reasoning was that people are not entitled to *equal treatment* in all matters whereby everyone receive equivalent benefits, burdens and opportunities; rather they have a right to *treatment as an equal* which guarantees equal respect and concern. For this reason, Dworkin wrote:

We are therefore left, in *DeFunis*, with the simple and straightforward argument with which we began. Racial criteria are not necessarily the right standards for deciding which applicants should be accepted by law schools. But neither are intellectual criteria, nor indeed, any other set of criteria. The fairness – and constitutionality – of any admissions program must be tested in the same way. It is justified if it serves a proper

⁹²⁹ *DeFunis v. Odegaard*, 416 U.S. 312 (1974)

⁹³⁰ Dworkin, *Taking Rights Seriously*, *supra* note 810 at 223-239

⁹³¹ *Ibid.* at 223

⁹³² *Ibid.*

⁹³³ *Ibid.* at 223-239

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.* at 239

policy that respects the right of all members of the community to be treated as equals, but not otherwise. The criteria used by schools that refused to consider blacks failed that test, but the criteria used by the Washington University Law School do not.⁹³⁷

Therefore, using the rationality offered by Dworkin on reverse discrimination in *DeFunis v. Odegaard*,⁹³⁸ having different criteria of well-founded fear, namely, a single objective element for the “well-founded fear” in section 96 of the *IRPA*, for unaccompanied minors seeking asylum, is defensible and that any discrimination against adult refugee claimants in this context would be justifiable.

Dworkin elaborates further on the notion of equality by illustrating that when someone proposes private medicine to be abolished to protect equality, this person is appealing to equality in its normative sense.⁹³⁹ Dworkin stresses that this person believes that “treating people as equals requires making their situations the same in ways that include offering them the same opportunity for medical care”.⁹⁴⁰ However, someone else rejecting this proposal might believe that “the soundest conception of equality does not require that”.⁹⁴¹

Dworkin accentuates the notion of equality to underpin his concept of justice.⁹⁴² It is up to those who accept this theory to apply it to everyday practical situations. In any event, this theory gives food for thought. Equality is not a novel concept. Over the ages, the concept of equality has changed.⁹⁴³ The difficulty has been to relate the abstract to practical every-day problems. Although inequalities exist in opportunity, social relations and in economics, the question has been and will continue to be how to reduce those inequalities, while fully mindful that each human being, though identical in nature, has unique characteristics.⁹⁴⁴ Incidental to this is the necessity to find, where differences do exist, how they may be understood and rationalized or overcome. Differences do exist among adults and children. To reconsider the criteria of well-founded fear, to be

⁹³⁷ *Ibid.*

⁹³⁸ *DeFunis v. Odegaard*, *supra* note 929

⁹³⁹ Ronald Dworkin, *Sovereign Virtue* (London: Harvard University Press, 2000) at 133

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

⁹⁴² Fogarty, *supra* note 922

⁹⁴³ *Ibid.*

⁹⁴⁴ *Ibid.*

consisting of a single objective element, for unaccompanied minors seeking asylum in Canada would be one way to reduce inequality between them and adult refugee claimants.

CONCLUSION

To conclude, there is a need to redefine the criteria of well-founded fear for unaccompanied minors seeking refugee status in Canada, such that the requirement of subjective fear for the ‘well-founded fear’ in section 96 of the *IRPA* is eliminated for them. This means that unaccompanied minors need only be required to prove a single objective element for the ‘well-founded fear’ in section 96 of the *IRPA* to qualify for Convention refugee status. This objective was illustrated by showing that unaccompanied minors’ right to equality under section 15 of the Canadian Charter⁹⁴⁵ is violated by requiring them to prove both their subjective fear and objective fear, and that this violation is not reasonable and not demonstrably justified in a free and democratic society, under section 1 of the Canadian Charter.⁹⁴⁶ In addition, the need for unaccompanied minors to prove a single objective element for their well-founded fear, without having to demonstrate their subjective fear, was justified with the legal theory of Ronald Dworkin, applying principle, strategy distinguishing substance and process, constructive interpretation, rule-book conception, rights conception, right to equality and reverse discrimination.

Geraldine Sadoway noted that although most of the world’s children in danger of persecution do not reach Canada, however, those who arrive in Canada with their parents are dealt with in the context of their parents’ refugee claims.⁹⁴⁷ This means that when their parents prove their well-founded fear, the dependent children are automatically accorded refugee status, without having to prove their own well-founded

⁹⁴⁵ *Charter*, *supra* note 58, s. 15

⁹⁴⁶ *Ibid.*, s. 1

⁹⁴⁷ Geraldine Sadoway, “Refugee Children before the Immigration and Refugee Board” (1997) 35 Imm. L.R. (2d) 106 [Sadoway, “Refugee Children”]

fear.⁹⁴⁸ This approach is in line with the right to respect for family life so that when the head of family fulfils the criteria for refugee status, the accompanying dependent children will be granted refugee status.⁹⁴⁹ This is a common practice of States, though not required under any article of the refugee treaties but done to promote family unity.⁹⁵⁰

However, growing numbers of unaccompanied refugee minors are arriving in Canada and appearing before the IRB to make refugee claims,⁹⁵¹ where these minors have to prove independently their well-founded fear to qualify for refugee status.⁹⁵² Melissa Anderson, a spokesperson for the IRB confirmed that the agency does not have statistics for unaccompanied minors who make asylum claims and that this problem would be rectified one day but until then the IRB does not have a way to get accurate information on this.⁹⁵³ Therefore, at present, there are no official numbers available for Canada, according to refugee and child welfare organizations.⁹⁵⁴ Although the IRB has issued guidelines to deal with procedural and evidentiary issues for refugee children, these guidelines do not deal with the substantive issues of what constitutes a well-founded fear of persecution for child claimants and how the Convention grounds for fear of persecution may be applied to cases concerning child claimants.⁹⁵⁵

Unaccompanied minors seeking asylum, being the most vulnerable and disadvantaged children within a country's borders, should see their rights realized and protected by governments.⁹⁵⁶ The equality right of unaccompanied minors, seeking asylum in Canada, has to be realized in the context that unaccompanied minors should not be required to demonstrate their subjective fear to establish their well-founded fear under section 96 of the *IRPA*, unlike adult refugee claimants. This is because children

⁹⁴⁸ Bueren, *supra* note 39 at 363

⁹⁴⁹ *Ibid.* at 364

⁹⁵⁰ UNHCR, *Handbook*, *supra* note 41 at paras. 181-188

⁹⁵¹ Sadoway, "Refugee Children", *supra* note 947

⁹⁵² Bueren, *supra* note 39 at 364

⁹⁵³ Phinjo Gombu "Lost kids from afar dumped at Pearson" *Toronto Star* (31 January 2007) online: *Toronto Star* < <http://www.thestar.com/0131072359/utilities/todayPaper> >

⁹⁵⁴ *Ibid.*

⁹⁵⁵ Sadoway, "Refugee Children", *supra* note 947

⁹⁵⁶ Danuta Villareal, "To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seeker" (2004) 26 *Hous. J. Int'l L.* 743

may not be able to articulate acceptable reasons for fleeing their country of origin, or to demonstrate their well-founded fear of persecution on one of the five specified grounds.⁹⁵⁷

Furthermore, the United States' Immigration and Naturalization Guidelines (INS Guidelines) highlighted that a child refugee claimant may be less willing or able to speak about the experiences and events that led the child to leave his or her country of origin because this would result in reliving the trauma of the past events.⁹⁵⁸ Moreover, the balance between the subjective fear and the objective circumstances may also be more difficult to assess in the case of unaccompanied minors.⁹⁵⁹ In addition, proving a well-founded fear of persecution may present evidentiary difficulties for unaccompanied minors.⁹⁶⁰ When children's testimony is required, in the absence of documentary evidence or other evidence that can be usually obtained from human rights data on the country of origin, in such a case, consistent and credible testimonial evidence of unaccompanied minors could constitute the objective foundation of their claim. It has to be noted that consistent and credible testimony of a claimant is not subjective but objective evidence.⁹⁶¹ However, trauma can alter the account of an experience related by children in ways such as memory blocks could compromise the coherence of trauma stories, difficulty in concentrating could be responsible for numerous little mistakes that can be easily interpreted as lack of credibility by decision-makers, and trauma could alter perception of time and could distort reports of the time sequence.⁹⁶² Therefore, when assessing an individual child's refugee claim, decision-makers should give the benefit of the doubt to an unaccompanied minor when there are some concerns on the credibility of his or her story.⁹⁶³

⁹⁵⁷ Michael Olivas, "Unaccompanied Refugee Children: Detention, Due Process, and Disgrace" (1990) 2 Stan. L. & Pol'y Rev. 159 at 162

⁹⁵⁸ INS GUIDELINES, *supra* note 137 at 4-5

⁹⁵⁹ *Ibid.* at 11

⁹⁶⁰ Villareal, *supra* note 956

⁹⁶¹ See Hathaway & Hicks, *supra* note 31

⁹⁶² See Crépeau, Houle & Foxen, *supra* note 218 at 48 and 49

⁹⁶³ Inter-Agency, *supra* note 385 at 60 and 61

Given that “[t]he subjective basis for the fear of persecution rests solely on the credibility of the applicants”,⁹⁶⁴ a broader single objective test that eliminates the requirement of subjective fear and that considers children’s testimony, even with some concerns of credibility and inconsistencies, as objective evidence would ensure that individual and special circumstances of unaccompanied minors are considered to ascertain their well-founded fear in the refugee determination process. Lack of credibility assessment has to consider the age of unaccompanied minors that they might be stressed by their journey from their country of origin to a new asylum country without their parents and that they might not remember all of the events clearly so as to give a credible testimony of their pre-application conduct. Bhabha and Young noted that the refugee claims of children have suffered from skepticism “about the reliability of child testimony”.⁹⁶⁵ Most of the Federal Court of Canada decisions on refugee claims by unaccompanied minors involve refusals by the IRB based on lack of credibility of the minor claimant.⁹⁶⁶ Geraldine Sadoway highlighted that such decisions are especially difficult to be overturned at the Federal Court level because of the presumption that the IRB is in the best position to assess the credibility of the refugee claimants before them.⁹⁶⁷

Eliminating the subjective fear requirement from the traditional criteria of well-founded fear for unaccompanied minors would take into account the age, vulnerability and the special needs of children because a finding of lack of subjective fear is equivalent to lack of credibility assessment.⁹⁶⁸ The Federal Court of Canada has held that objective documentation, at best, can only demonstrate that a refugee claimant has an objective fear of persecution.⁹⁶⁹ Refugee claimants have the burden to prove that they

⁹⁶⁴ *Maximilok*, *supra* note 320 at para. 17

⁹⁶⁵ Bhabha & Young, *supra* note 140 at 98

⁹⁶⁶ See *Uthayakumar*, *supra* note 326; *Manimaran*, *supra* note 701; *Ali*, *supra* note 701; *Sivanathan*, *supra* note 701; *Gonzalez*, *supra* note 701; *Kurukulasuriya*, *supra* note 701

⁹⁶⁷ Sadoway, “Refugee Children”, *supra* note 947

⁹⁶⁸ See *Yusuf*, *supra* note 202 at 631-632 (Finding of lack of subjective fear is equivalent to lack of credibility assessment); See Hathaway & Hicks, *supra* note 31 at 531 (Growing practice of equating lack of credibility with absence of subjective fear)

⁹⁶⁹ *Desronvilles*, *supra* note 703 at para. 12

have a subjective fear of persecution.⁹⁷⁰ When unaccompanied minors' narrative and the facts supporting their refugee claim are not credible, they would be deemed not able to establish their subjective fear of persecution and thus, they could not establish that they are in need of refugee protection.⁹⁷¹

Finally, a re-interpretation of section 96 of the *IRPA* to require a single objective element for unaccompanied minors seeking asylum in Canada, eliminating the need for them to demonstrate their subjective fear, would bring this section in compliance with the formal requisites of section 15 of the Canadian Charter. In this manner, substantive equality can be achieved for asylum seeking unaccompanied minors. Substantive equality will require addressing omissions (what needs to be added to satisfy substantive equality) and commissions (what needs to be removed to achieve substantive equality).⁹⁷² Substantive equality is not like formal equality that ensures everyone is subject to the law and everyone is treated in the same way.⁹⁷³ Justice L'Heureux-Dubé emphasized that "[w]ith the Charter, we have gone from requiring that laws be applied in the same way to everyone, to the stage of requiring that the laws, themselves, treat individuals as substantive equals."⁹⁷⁴ Several Supreme Court of Canada cases show why differential treatment may lead to substantive equality in some cases, while similar treatment may lead to substantive inequality in other cases.⁹⁷⁵ Requiring unaccompanied minors to establish their objective fear exclusively for their well-founded fear would result in substantive equality for them, taking into account their disadvantage in society, their age, their vulnerability and their unaccompanied status.

⁹⁷⁰ *Ibid.*

⁹⁷¹ See *ibid.*

⁹⁷² Patricia Hughes, "Substantive Equality, Social Ordering and Constitutional Recognition" in Joseph Eliot Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 8th ed. Vol. 2 (Edmonton: Juriliber Limited, 2001) 745 at 754

⁹⁷³ *Ibid.*

⁹⁷⁴ Justice Claire L'Heureux-Dubé, "Conversation on Equality" in *Constitutional Law of Canada: Cases, Notes and Materials*, 8th ed. Vol. 2 (Edmonton: Juriliber Limited, 2001) 737 at 740

⁹⁷⁵ See *Weatherall v. Canada*, [1993] 2 S.C.R. 872 (Case where being treated differently did not lead to substantive inequality. The Court upheld that different treatment of male and female prisoners demonstrates that equality may sometimes allow or require differential treatment); See *British Columbia (Public Service Employee Relations Committee) v. BCGSEU*, [1999] 3 S.C.R. 3 (Case where being treated the same led to substantive inequality.); See *Eldridge*, *supra* note 460 (Case where similar treatment was held to create substantive inequality.)

Moreover, “the right to equality is a redistributive right” and “[i]t questions the justice of the distribution of rights, privileges, burdens, power, and material resources in society and the basis for that distribution.”⁹⁷⁶ The right to equality “requires us to articulate and critically examine previously unspoken assumptions and norms and how these norms are embedded in the laws”.⁹⁷⁷ Provisions, such as section 96 of the *IRPA* have to be critically examined to secure substantive equality for unaccompanied minors seeking asylum in Canada. The norm of requiring subjective fear and objective fear from unaccompanied minors has to be critically examined.

Indeed, in Dworkin’s view, for nearly all legal questions, there is a unique right answer, a best interpretation.⁹⁷⁸ Adopting a single objective element for the criteria of well-founded fear, in the case of unaccompanied minors seeking asylum in Canada, would result in a best interpretation, considering their plight and vulnerability.

Besides, Canadian society has always recognized that children are deserving of a heightened form of protection. This protection rests on the best interests of the child.⁹⁷⁹ According to the UNHCR, “[t]he ‘best interests of the child’ means that legislative bodies must consider whether laws being adopted or amended will benefit children in the best possible way”.⁹⁸⁰ Redefining the criteria of well-founded fear for unaccompanied minors seeking asylum in Canada would recognize that their best interests are taken into consideration, recognizing that they are not able to demonstrate their subjective fear and that they deserve heightened form of protection in refugee determination hearings. This does not mean that all unaccompanied minors will be granted refugee status. However, it means that those minors who deserve refugee protection would not be prevented from getting it by their inability to express subjective fear or by inferences of lack of subjective fear that could be made by decision makers at refugee determination hearings.

⁹⁷⁶ Faraday, Denike & Stephenson, *supra* note 402 at 10

⁹⁷⁷ *Ibid.*

⁹⁷⁸ Lane, *supra* note 70

⁹⁷⁹ Sharpe, *supra* note 69 at para. 170

⁹⁸⁰ United Nations High Commissioner for Refugees (UNHCR), *Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians)*, 1 December 2001, online: UNHCR<<http://www.unhcr.org/publ/PUBL/3d4aba564.pdf>> at 74

By the way, like all other legal traditions such as the civil law tradition, the common law recognizes the rights and duties of individuals and that the principle aim of society is to protect individuals in the enjoyment of those rights.⁹⁸¹ Under the common law, the courts play a leading role in interpreting statutes.⁹⁸² Large areas of the law today are found in a statutory framework, and therefore, judges will be called upon to interpret the meaning of the statute.⁹⁸³ Although the court may decide that it is a matter best left for the legislator, it is critical to recognize the important role of the judiciary. That is, judges have the power to determine controversies and to protect the rights and interests of persons.⁹⁸⁴ Having said this, the special nature of unaccompanied minors should not be ignored and they should not be treated as miniature of adults. Their best interests should be considered. Above all, “the best interests of the child cannot mean nowadays anything other than the full realization of the child’s rights”.⁹⁸⁵

⁹⁸¹ W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769) at Book 1, Chapter 16, cited in Rios-Kohn, *supra* note 754 at 37

⁹⁸² Rios-Kohn, *supra* note 754 at 37

⁹⁸³ *Ibid.* at 38

⁹⁸⁴ *Ibid.* at 39

⁹⁸⁵ Emilio Garcia Méndez, “A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Civil Law Countries”, in UNICEF, *Protecting the World’s Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (New York: Cambridge University Press, 2007) 100 at 108

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